Public Utilities

FORTNIGHTLY

August 17, 1944

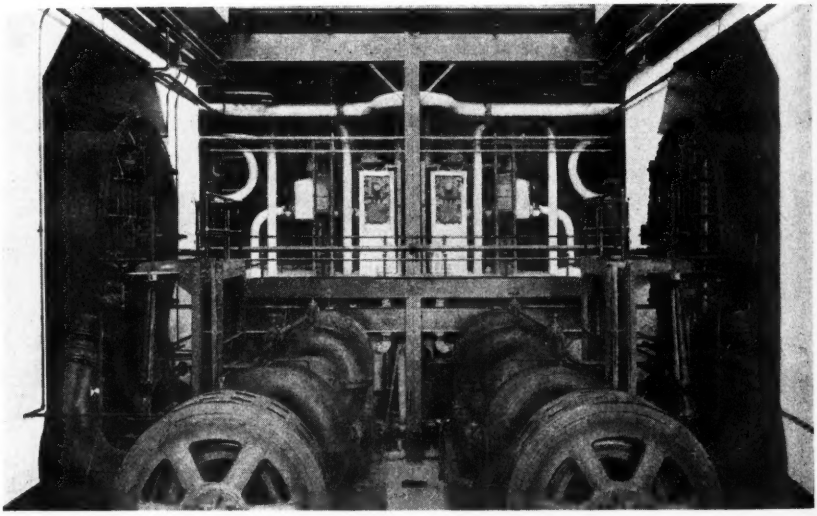
PUBLIC UTILITIES REPORTS, INC.
PUBLISHERS

Blazing THE ENGINEERING TRAI

EXPANDED CONDENSER TUBES

★ The first surface condenser to have all tubes expanded into tube sheets at both ends was designed and built by Foster Wheeler twenty-one years ago for the Texas Power and Light Company, Trinidad, Texas. This construction insures permanently tight joints to eliminate contamination of condensate by the circulating water.

Performance of this installation was so eminently satisfactory, showing far greater purity of condensate than obtained from other designs, that the principle of expanding condenser tubes at both ends has since become a standard practice.



Condensers of the Trinidad Station of Texas Power and Light Company were the first to have all tubes expanded into tube sheets at both ends.

FOSTER WHEELER CORPORATION ● 165 BROADWAY, NEW YORK 6, NEW YO

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Public Utilities Fortnightly

VOLUME XXXIV *August 17, 1944* NUMBER 4

Contents of previous issues of PUBLIC UTILITIES FORTNIGHTLY *can be found by consulting the "Industrial Arts Index" in your library.*

¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

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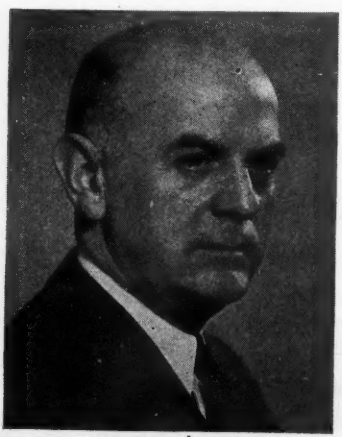
Pages with the Editors

As these lines are written the Michigan Public Service Commission is still struggling gamely with one of the most troublesome regulatory problems in the recent history of public utility industries in America. And that is really saying something, because the regulatory history of public utilities in America has been troublesome indeed. The Michigan commission's problem was one which its own state supreme court tossed into its lap in the form of the controversial Detroit Edison Case.

THIS was the case which decided that the Michigan commission had the authority to exclude, from a utility's operating expenses, expenditures which could be avoided—specifically, the excess profits tax. The result, as most readers of these pages are probably aware, has been a series of repercussions. The first reaction was the thought that the Federal Treasury would not relish the idea of rate reductions ordered expressly for the purpose of absorbing excess profits tax liability. Secretary of the Treasury Morgenthau then issued a somewhat far-reaching statement to the effect that the Treasury had no complaint to make against such rate reductions even if they did result in lowering Federal tax revenues from the utility industry.

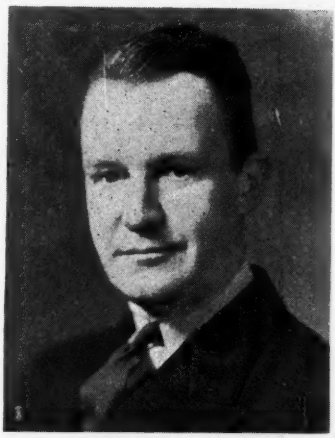
A NUMBER of other regulatory authorities began exploring the interesting possibility of rate reductions "in lieu of taxes." Some have even gone so far as to consider the possibility of reducing utility rates to offset, not only Federal excess profits taxes, but *any* war tax (or tax increase since the war) now being charged against utility operations. This, as the well-known New York city business writer, ERNEST R. ABRAMS, points out in his article on this subject (beginning page 207 of this issue), is really a *reductio ad absurdum*. Perhaps the very absurdity of the reduction may reveal a sane and practical solution.



JOSEPH P. O'CONNELL

Only legislative common sense protects us from a universal public utility concept.

(SEE PAGE 217)



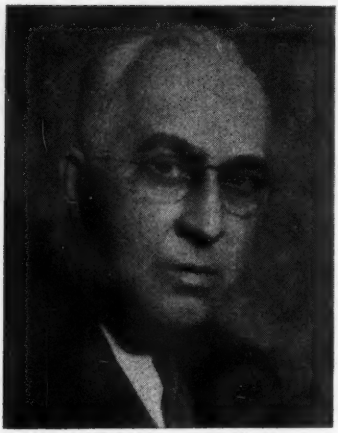
RAYMOND S. TOMPKINS

There is an indivisible link between free enterprise and free speech.

(SEE PAGE 201)

BUT, after all, if an excess profits tax is an avoidable expense (meaning that the tax liability could be avoided by cutting revenues through rate reductions), then all corporate income taxes are likewise avoidable. It would follow from this that rates could be cut until the company has no income to be taxed at all, so that utility operations would continue on the basis of a charitable institution from which the investors would be expected to receive no return whatever.

THERE is some danger in taking this problem too lightly. There are those, for example, who point out that war taxes are relatively



ERNEST R. ABRAMS

Basic difficulties in our tax policy have ripened into regulatory mischief.

(SEE PAGE 207)

temporary and we can expect them to be reduced or abolished after the war. But does it necessarily follow that the regulatory problem thus posed in the Detroit Edison Case will pass with the elimination of war taxes?

THERE is the obvious complication of rate cuts which may be ordered on a relatively permanent basis for the present and would continue indefinitely into the postwar period. There is the less obvious complication posed by the city of Detroit which attempted not only to siphon off utility tax payments to Washington by way of rate reductions, but also to divert such payments on their way to Washington in the form of prior city taxes of fairly equal amounts. Such city taxes, if deemed validly imposed, would doubtless continue in existence after the war because they were not enacted for war purposes.

WE could think of a number of other complications, not necessarily temporary, which might follow in the wake of any program designed to divert, systematically, Federal tax payments into local tax payments or rate reductions. Not the least of these is the problem of public relations, when the time comes for boosting rates to a normal level because the passing of war boom earnings no longer supports reduction.

PERHAPS the real key, as MR. ABRAMS suggests, is getting back to a fundamentally sound tax policy, both Federal and local. Much of the trouble lies in the mischievous and misleading words, "excess profits," which Congress carelessly applied to what are essentially "war taxes" and should have been so called. Yet, the "excess profits" tax, with its connotation of something improper, unjustifiable, and extortionate, exercises an inevitable fascination for the political mind, ready to welcome such a ready-made label, regardless of its doubtful content.

A NEWCOMER to these pages is the author of the article on the relationship between ordinary business enterprise and the public utility status (beginning page 217). He is JOSEPH P. O'CONNELL, chairman of the public utilities commission of Connecticut, and a member of that body since 1941. MR. O'CONNELL is a native of Connecticut and a graduate of Fordham University School of Law. He was formerly corporation counsel for the city of Bristol and a city court judge in that community. He also served three terms in the Connecticut legislature.

RAYMOND S. TOMPKINS, author of the opening article in this issue, is at present director of information and service of the Baltimore Transit Company. He is a graduate of Georgetown University (LLB), who served as World War I correspondent for the Baltimore *Sun* in 1918 and as a European correspondent for the same distinguished journal in the early Twenties. He has lectured on journalism at Johns Hopkins University and is the author of numerous articles of both general and business interest for various publications.

AMONG the important decisions preprinted from *Public Utilities Reports* in the back of this number, may be found the following:

FORTUNATELY, for purposes of rounding out the discussion in the article by ERNEST R. ABRAMS, noted above, we happen to publish in this same issue the full text of the decision of the Michigan Supreme Court in the Detroit Edison Case, together with the dissenting opinion. It was in this decision that the authority of the Michigan commission to exclude Federal excess profits taxes from a utility's operating expenses was sustained over the objection of the Michigan Public Service Commission itself. (See page 65.)

TWO cases involving the sale of utility properties to a coöperative association were entertained by the Missouri Supreme Court and the Missouri commission respectively with the sales being approved. (See page 71.)

THE Securities and Exchange Commission considered whether physical interconnection alone results in integration of public utility properties under the Holding Company Act. (See page 118.)

THE next number of this magazine will be out August 31st.

The Editors

In This Issue

In Feature Articles

In Financial News

In What Others Think

In The March of Events

In The Latest Utility Rulings

PREPRINTS FROM PUBLIC UTILITIES REPORTS

Various regulatory rulings by courts and commissions reported in full text, pages 65-128, from 54 PUR(NS)

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

ROBERT A. TAFT
U. S. Senator from Ohio.

"I do not believe that a league of sovereign nations agreeing upon a rule of law and order throughout the world has today a real chance of success."

R. W. BROWN
President, Lehigh Valley Railroad Company.

"Every time the railroads manage to get five or six steps ahead of the sheriff, there are always those who want to lop off the earnings and put the roads back in the bread line."

ERIC A. JOHNSTON
President, United States Chamber of Commerce.

"Present taxes are too high for American enterprise to function. We won't have to vote socialism; we might get it by default if the government becomes the only source of capital for business."

JOSEPH W. MARTIN, JR.
U. S. Representative from Massachusetts.

"We are determined that Congress shall have a full voice in the making of the peace and in postwar planning. The sooner the bureaucrats awaken to that fact, the better it will be for all concerned."

WILLFORD I. KING
Professor, New York University.

"That monetary inflation gradually undermines the whole system of private enterprise is well illustrated by the series of directives being issued from Washington by the Office of Economic Stabilization."

EDWARD MARTIN
Governor of Pennsylvania.

"Everything labor has is at stake in this war. . . . Our form of government means more to labor than to any other group of Americans; and we know that we can depend upon aroused labor to do its full duty."

EDITORIAL STATEMENT
The Wall Street Journal.

"Obviously, Congress can no more manage TVA than the stockholders of a private corporation can manage it. Yet it must supervise and control its management. The question is the extent to which such control should be pushed."

JOHN W. BRICKER
Governor of Ohio.

"Unnecessary regulation of the individual and of enterprises should be avoided. The path down which the New Deal has trod and which there has been evidence on every hand that it will travel in the days ahead, after the war is won, will not lead to solution of the problem of employment; it would wreck the nation financially."

F. LEE TALMAN
Executive vice president, Transcontinental & Western Air, Inc.

"Our [aviation] industry has come a long way since we were almost wholly dependent upon mail revenues. In 1931 mail revenues were 82 per cent of total revenues, whereas, in 1943, mail revenues approximated only 17 per cent of the total."

EDITORIAL STATEMENT
Seattle Daily Times.

"Effort to get away from private ownership has fallen far short of arrival at true public ownership. Transfer of title to utility property doesn't complete the process. So far the turnover has merely been from intelligent private management to political group control."

ROBERT H. JACKSON
Associate Justice, United States Supreme Court.

"Moderation in change is all that makes judicial participation in the evolution of law tolerable. To overrule an important precedent is a serious business. It calls for sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other."

EDITORIAL STATEMENT
The New York Times.

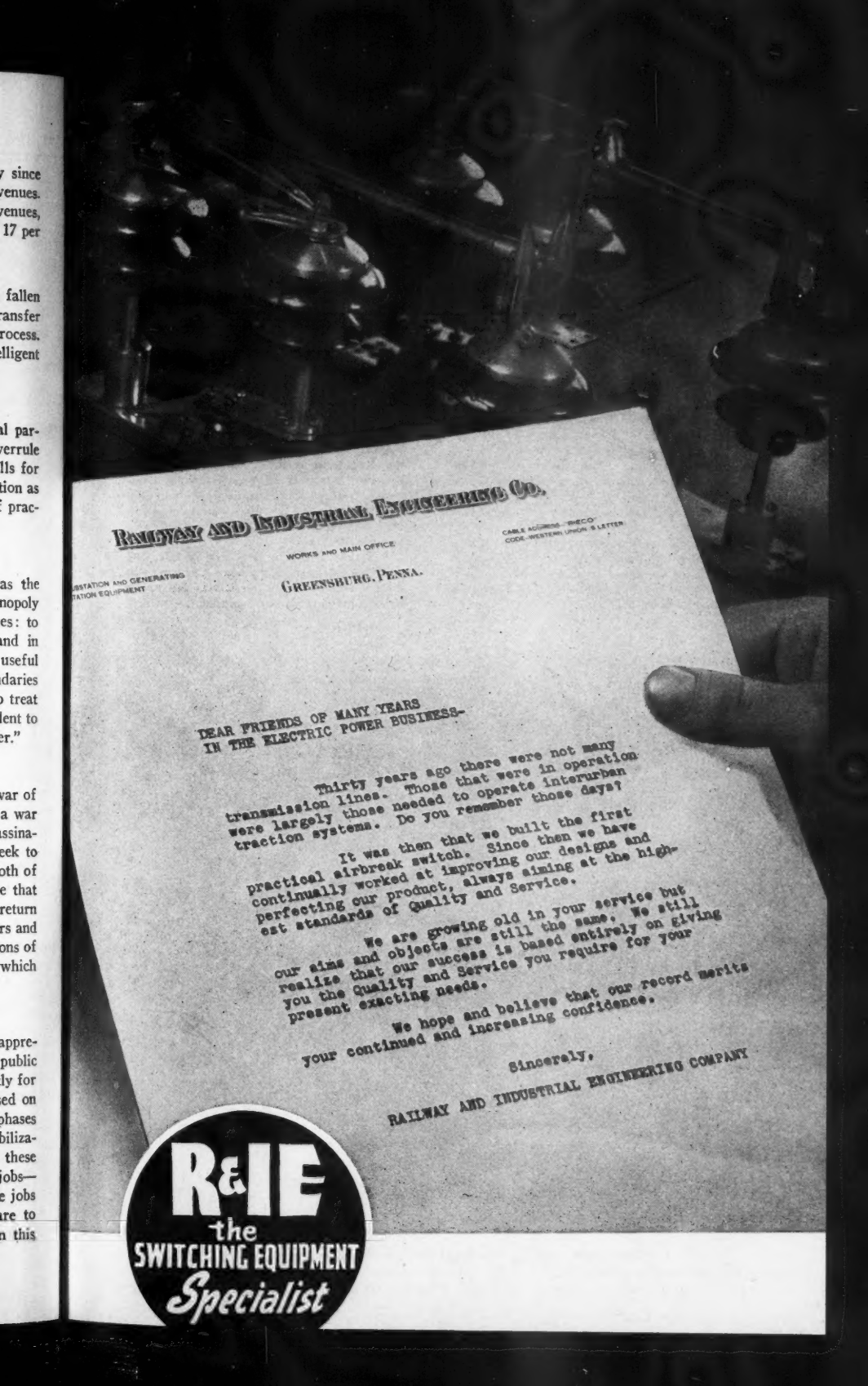
"The field of competition should be as wide as the general welfare requires, but there is a field for monopoly too. All democratic governments grant monopolies: to telephone companies, railroads, public utilities, and in the form of patents and copyrights. It might be useful to reëxamine these, and to ask whether the boundaries about them might be more narrowly drawn; but to treat the word 'monopoly' or 'cartel' as if it were equivalent to Fascism is not a rational way to approach the matter."

MARTIN DIES
U. S. Representative from Texas.

". . . we are really fighting two wars. One is a war of men, guns, tanks, planes, and ships. The other is a war of ideologies, rumors, intolerance, character assassinations, subversive activities, and propaganda that seek to destroy representative government. We must win both of these wars to preserve our freedom and guarantee that when my boy and your boy and our loved ones return from this awful conflict they will find the same Stars and Stripes waving triumphantly over the same institutions of freedom for which they fought and bled and for which their gallant comrades died."

DONALD K. DAVID
Dean, Harvard Business School.

"During the past year there has been a growing appreciation on the part of business leaders and of the public at large of the great importance of preparing currently for the resumption of normal industrial operations based on civilian requirements. The transition to successive phases of our war effort will inevitably involve the demobilization of certain portions of our armed forces. As these men return to this country they are going to want jobs—honest jobs, not relief work or the dole. And these jobs should be provided by private enterprise if we are to maintain sound economy and political conditions in this country."


RAILWAY AND INDUSTRIAL ENGINEERING CO.
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BSTATION AND GENERATING
TATION EQUIPMENT
DEAR FRIENDS OF MANY YEARS
IN THE ELECTRIC POWER BUSINESS-
Thirty years ago there were not many transmission lines. Those that were in operation were largely those needed to operate interurban traction systems. Do you remember those days?
It was then that we built the first practical airbreak switch. Since then we have continually worked at improving our designs and perfecting our product, always aiming at the highest standards of Quality and Service.
We are growing old in your service but our aims and objects are still the same. We still realize that our success is based entirely on giving you the Quality and Service you require for your present exacting needs.
We hope and believe that our record merits your continued and increasing confidence.
Sincerely,
RAILWAY AND INDUSTRIAL ENGINEERING COMPANY
R&IE
the
SWITCHING EQUIPMENT
Specialist

From DREAM *to* STEAM

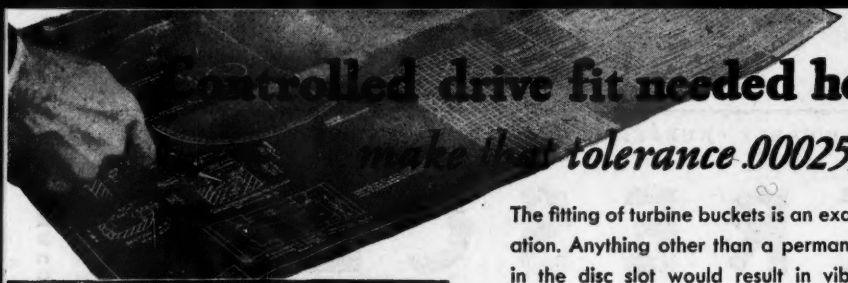
25-Year Vision of Ohio Electrical Pioneer Became Reality in New R. E. Burger Station

On January 21, 1944, The Ohio Public Service Company officially started up and dedicated its new modern generating station at Dilles Bottom, Ohio, on the Ohio River. It was a momentous occasion for officials and engineers of OPS. A dream had come true. More than 20 years of foresight and planning had at last become a reality. No less an achievement was the excellent service rendered by the existing plants on the system during this long period of planning, and especially during the past few years, when the demand for electric power was greater than ever.

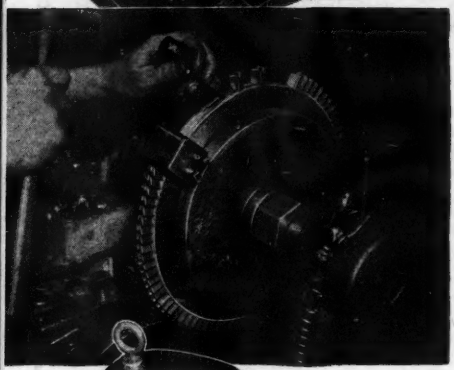
Completion of the new station was a particularly significant climax for R. E. Burger, President of Cities Service Power & Light Company. Pioneering the idea of building a central station on the site, he saw his vision and judgment vindicated as the steam throttle was opened for the first time and the 62,500-Kw turbo-generator began to hum in the plant appropriately named in his honor. It was a proud day, too, for the men who had surmounted a long chain of wartime obstacles in constructing the plant that, according to OPS President, T. O. Kennedy, "guarantees ample electricity for all war manufacturing needs in our territory. After the war, it insures all persons on our Company's lines an abundance of power enabling them to make full use of the many electrical servants—the labor-saving devices they will be able to obtain".

Babcock & Wilcox, in saluting this OPS achievement, is proud to have had a part in it by furnishing the power behind the power—the steam-generating equipment.

Three B&W Type E Pulverizers serve each of the Stirling Boilers.



"Controlled drive fit needed here—make that tolerance .00025!"



Driving turbine buckets into place on the wheel. Very close fit insures permanent tightness.

The fitting of turbine buckets is an exacting operation. Anything other than a permanent tight fit in the disc slot would result in vibration and eventual bucket failure. So Elliott engineers dictate a very close tolerance and special gauges for this detail. Pretty close work, and requiring real skill, but essential to the kind of performance expected of an Elliott turbine. This is the opinion of Elliott engineers, based on their many years of turbine-building experience.

The entire Elliott turbine is built with the same seasoned engineering judgment applied to dimensions, tolerances, materials, production methods, and other engineering features which affect ultimate performance. Certain design features are perhaps better than they need to be for small turbines, but many users want a turbine that needs no pampering, that will give uninterrupted service under any reasonable conditions (and some pretty unreasonable). They get such service from Elliott turbines.

●

The booklet about these turbines will give you very interesting factual evidence and data. It is valuable to have on file, even though you may not immediately need turbines. Write for a copy.

ELLIOTT COMPANY

STEAM TURBINE DEPARTMENT

JEANNETTE, PA.

DISTRICT OFFICES IN PRINCIPAL CITIES

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ELLIOTT TURBINES

for Mechanical Drive

Utilities Almanack

Due to wartime travel restriction, conventions listed are subject to cancellation.

AUGUST

17	T[h]	¶ *Pacific Coast Gas Association will hold meeting, Los Angeles, Cal., Sept. 13, 14, 1944.*
18	F	¶ *Edison Electric Institute, Accident Prevention Committee, will hold session, New York, N. Y., Sept. 12, 13, 1944.*
19	S[a]	¶ *International Association of Electrical Inspectors, Western Section, will hold convention, Indianapolis, Ind., Sept. 11–13, 1944.*
20	S	¶ *Illuminating Engineering Society will convene, Chicago, Ill., Sept. 14–16, 1944.*
21	M	¶ *International Association of Electrical Inspectors, Northwestern Section, starts meeting, Olympia, Wash., 1944.*
22	T[u]	¶ *American Standards Association will hold convention, New York, N. Y., Sept. 21, 1944.*
23	W	¶ *American Water Works Association, Rocky Mountain Section, will convene, Denver, Colo., Sept. 21, 22, 1944.*
24	T[h]	¶ *American Public Works Congress will hold meeting, St. Paul, Minn., Sept. 24-27, 1944.*
25	F	¶ *National Safety Congress of National Safety Council will convene, Chicago, Ill., Oct. 3–5, 1944.*
26	S[a]	¶ *American Gas Association will hold meeting, Chicago, Ill., Oct. 5, 6, 1944.*
27	S	¶ *United States Independent Telephone Association will hold convention, Chicago, Ill., Oct. 10–12, 1944.*
28	M	¶ *International Association of Electrical Inspectors, Southwestern Section, convenes for session, Modesto, Cal., 1944.*
29	T[u]	¶ *American Institute of Electrical Inspectors opens Pacific coast technical meeting, Los Angeles, Cal., 1944.*
30	W	¶ *South Dakota Telephone Association will hold meeting, Mitchell, S. D., Oct. 19, 1944.*

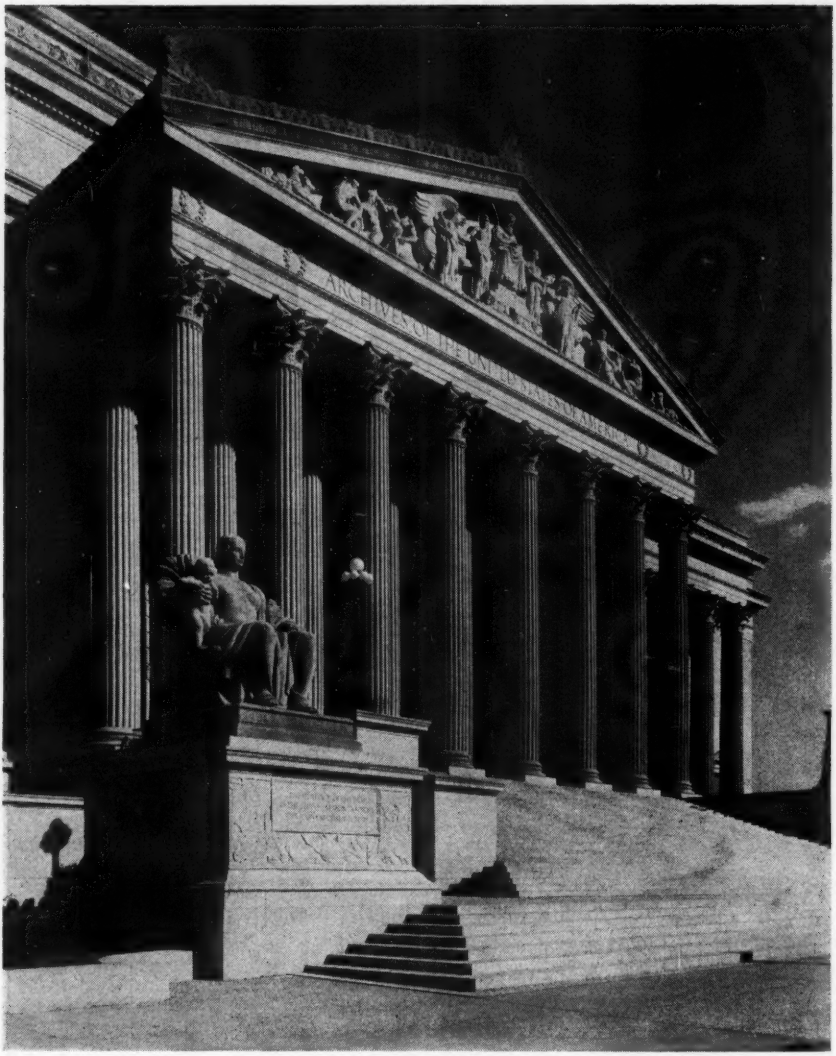

Photo by Horydczak

National Archives Building

Public Utilities

FORTNIGHTLY

VOL. XXXIV; No. 4 AUGUST 17, 1944

Danger Facing the Press

The fact that 30 per cent of persons questioned in a poll of public opinion stated they believed newspapers in time of peace should not have the right to criticize the government, a significant sign of a growing menace to freedom of speech, which, in the opinion of the author, must be combated before it is too late.

BY RAYMOND S. TOMPKINS

UNLESS I am reading the wrong newspapers and picking up information from the wrong people there are more fears for freedom of the press in our country at the present time than there are for the future of private ownership and state regulation for utilities.

There are plenty of reasons for this. One is that we are busy fighting a couple of wars. This reason is interconnected with another, that we have a military censorship of the press (and, of course, the radio), which necessarily circumscribes its freedom. The press and its struggle to do its work and yet stay within military limitations are therefore spotlighted. Its workers and disciples are full of fears that present military restrictions will be continued after the war, or at least that an attempt will be made to continue them. Books are being written on the theme that a free press and free speech have never been in greater danger in the United States than they are now. Oswald Garrison Villard has just turned out one entitled, "The Disappearing Daily." *The Atlantic Monthly* has been holding an essay contest on "Freedom of the Press," with a thousand dollar prize for the best one.

Utilities are currently in no such situation as the newspapers. No inquisitorial Federal spotlight now chases them up the dark alleys. Advocates of public ownership of utilities are less vocal than they used to be because people haven't got time to listen to them. The emphasis has shifted. The utility business, for all its wartime headaches (and they are many), feels a little more comfortable. Thus a great paradox entertains us. It is not the utility business now that fears the dead hand of Federal domination but that Galahad of all the knights of American freedom, the free press of the United States.

It ought not to be necessary to warn utility men against any complacency about this situation. No man could stay in the utility business who was so dull as not to see that if newspapermen lose their freedom utility men are no better than slaves from that moment.

BUT some may be dubious about our premise—that freedom of the press is really in any danger. Let them not delude themselves. If the current furor about it is not enough to convince them that at least some trained observers fear this danger, let them consider a recent symposium of "public opinion polls."

This symposium was published in the spring, 1944, issue of *Public Opinion Quarterly,* a publication devoted to scientific study of and comment on public opinion. There had been undertaken by a number of analysts a sampling of public opinion on a question worded something like this:

"Do you think that, in peacetime, the newspapers should continue to have the right to criticize the government?"

Thirty per cent answered "no." Four per cent were "undecided."

Staggered by this incredible response to a question that would seem to any "right-thinking man" to be susceptible of but one answer, the reader may wonder whether those polled really understood the question. The analysts assume that they did. They make no allowances in their reports for failure to understand plain English.

Thirty per cent is a minority. But if this sample 30 per cent is any indication that a similar proportion of the whole public seriously believes newspapers in normal times should be prohibited from criticizing the Federal government, then the notion that freedom of the press in America faces no danger is a delusion and no careful citizen will entertain it a moment longer. As a minority 30 per cent is too substantial for comfort. Properly nurtured 30 per cent can become 40 per cent, then 50 per cent, then a majority.

IS it likely that Washington disciples and prophets of Federal authoritarianism are unaware of this little symposium of public opinion polls? Hardly. Nor were they unmindful of it when President Roosevelt got back from Hobcaw Barony last spring and berated the press and radio for "holding back the facts" about the Montgomery Ward Case. There are people who have always believed and always will believe that "something ought to be done" about the newspapers. These same people now also believe that "something ought to be done" about the radio. They are people who have been irked by something the newspapers have printed or the radios have said. Possibly they have felt personally

Free Speech and Free Criticism

"FREEDOM to criticize has not always been esteemed as a boon by utility men. They have been on the receiving end of criticism long enough to be used to it; but while normal human nature can get used to taking a beating never it comes around to really liking it. However, there is surely no one in the utility business so stupid that he would willingly see free speech and free criticism abridged or controlled by the government merely because such criticism might sometimes be directed at him."

aggrieved, or some styles of journalism may simply violate their own personal conceptions of good taste or good sense or sound politics, economics, sociology, humor, or religion. They believe "there orta be a law."

These people form a nucleus of public opinion inimical to freedom of the press. Doubtless, if confronted with this accusation, most of them, believing themselves as good Americans as anybody else, would deny it. They are, nevertheless, the backbone of that 30 per cent above mentioned. And they are the people through whom the President in Washington addressed his attack on the press when, talking to the White House reporters, he denounced the newspapers and radio for betraying their public trust when the Army carried out Sewell Avery and deposited him in the street. He said they had not told the truth.

THIS was not an original propaganda tactic. It has been frequently and effectively used in recent years since the arts of propaganda have become better understood, in efforts to make good cases out of bad ones. It is an especially potent tool in the hands of the nation's Chief Executive. No newspaperman can call the President of the United States a prevaricator. Few papers did anything on this occasion except report (in indirect quotes as required by White House rules), the President's attack on the press and his own recital of the Montgomery Ward story which he blandly insisted the newspapers had suppressed. True, editorial writers and radio commentators followed it up with the flat simple statement that what the President had said did not square with the facts.

But the President made his statement boldly and unequivocally with

none of the shrinking or queasiness which people associate with obviously flimsy utterances. He tossed aside indignant denials with a wave of his cigarette holder. That was his story and he stuck to it. And he is the President.

This writer is not aware of any sampling of public opinion taken immediately after this episode. If one was taken it will doubtless be published in due course. But it seems proper here to venture a guess that the President's statement produced a rise in the percentage of people who think "newspapers in peacetime should not be permitted to criticize the government." Probably first to be added to the 30 per cent would be the "undecided" 4 per cent. By such means are plans to increase authoritarian controls over free institutions fostered and advanced *with the help of the people themselves.*

THIS is not the place to discuss ways and means of combating these menaces to freedom of the press. But combated they must be because if a free press goes, all other freedoms go with them because there is no longer freedom to criticize.

Freedom to criticize has not always been esteemed as a boon by utility men. They have been on the receiving end of criticism long enough to be used to it; but while normal human nature can get used to taking a beating it never comes around to really liking it. However, there is surely no one in the utility business so stupid that he would willingly see free speech and free criticism abridged or controlled by the government merely because such criticism might sometimes be directed at him. For it is a right that works both ways, the utility man being also a private citizen with the same rights to be upheld and wrongs to be redressed as every other private citizen.

With the disappearance of freedom to criticize the government an era of Federal control of all social and industrial activities would surely begin. This control would be absolute and there would be no appeal from it, since appeal from the judgments of the government would imply criticism.

Government operation and control of public utilities have been the subject of study, controversy, and speculation for many years and probably will continue to be. But the kind of government operation envisaged has been the kind the people are supposed (by disciples of that doctrine) to demand as a democratic right: a form of operation which is supposed to provide them with the lower rates and the better service which would follow ownership and control by themselves — the people. There has never been envisaged a kind of government operation of utilities not demanded by the people but thrust upon them as part of a universal program of authoritarianism in which the *right of the people to maintain their places in a system of private enterprise —as customers and critics of private enterprise—will be eliminated.* There has never been contemplated by the people a form of government ownership and operation of utility services which would not be subjected to criticism by the customers—which would, in all likelihood (or at least could), punish critics of bad lighting and gas and transit service for violation of a Federal anticriticism law.

The reader may say all this is nonsense, that public opinion will

never sanction such complete totalitarianism in this country. In fact this writer said as much in a previous article in this magazine. We believed that our democratic system had a fine future before it because public opinion had a fine future. When governmental excesses and tyrannies outraged public opinion as they would be bound to do, then public opinion would demand that they be changed, we said.

If, as we thought we had a right to expect, public opinion was going to function naturally and democratically, then the public utility business would have no more to fear in the future than it had in the past. Public opinion would revolt against continued government control of all our activities; would become intolerant of profligate government spending; intolerant of combines or alliances betwixt the Executive and Judicial branches of the government to sidetrack and shackle the Legislative branch; intolerant of interference with the rights of states; intolerant of every symptom of authoritarianism.

But to prevent dictatorship or accomplish its overthrow public opinion has got to *want* to prevent or overthrow it. If dictatorship is what public opinion wants, then that is what it will get. If the people agree to placing gyves and shackles on their newspapers and radio (which is what will happen if the 30 per cent now seemingly favoring prohibition of press criticism of government get what they want), then they will have deserted their most powerful public-opinion-forming influences for something else, presumably the dictates of a national leader or fuehrer. They will have attained the ultimate triumph of those who think public opinion ought not to be free, but that it ought to be controlled—the final achievement of people who are tired of freedom or afraid of it and want to be controlled and told what to do.

Is this fantastic? I do not think so. Many are quietly busy even now trying to accomplish it. Students of public opinion know that there exists amongst social science analysts, including instructors and professors in some American colleges, the feeling that there is frequently in this country "too much free speech." They say they believe it will not be possible for the United States to play its part in the "family of nations" after the war if "too much free speech" is to continue to irk and displease our British, Russian, and Chinese cousins, to alarm the small nations and shake their faith in our stability; in short, to keep gumming up the works and upsetting the applecart. "Too much free speech," these social science analysts say, was responsible for the collapse of republican government in France and Ger-

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¶ "WITH *the disappearance of freedom to criticize the government an era of Federal control of all social and industrial activities would surely begin. This control would be absolute and there would be no appeal from it, since appeal from the judgments of the government would imply criticism.*"

many; and it will be the death of world coöperation and of our own democracy if we don't do something about it quickly.

That is why bold attacks on the press like that made by the President in the Montgomery Ward Case — whether they are just or unjust—are alarming to students of the ways and means of manipulating public opinion which are being freely and shrewdly used these days. It is time they took alarm; and it is high time everyone took alarm, including men who are so deeply engrossed in the difficult and complex details of operating public utilities that they are content to let those most directly interested in the American press fight for its freedom, without help from those who know nothing about journalism but sometimes think it could be improved. It is not necessary to know anything about journalism to get into this fight for freedom of the press. Nor is it necessary to give up the notion that the press could be improved; because of course it can be, like every other art and trade.

No, what is needed is that the danger be seen, and that it then be fought against, tooth and nail. For unless it is fought and beaten the story of the final collapse of American democracy will be the story of the men who discovered that by government control of one small simple human function they could blanket all other functions, freedoms, and liberties under one complete system of authoritarianism at one fell swoop, without having to catch and bind them up one at a time, with a long tedious struggle each time.

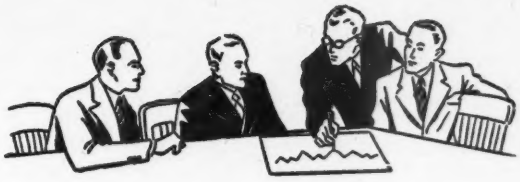
That one simple function, by control of which they will have gotten control of all the others, will be the function of public criticism.

After Television, the Teletactor?

"THE end is not yet. If we can disembody ourselves to the extent of transmitting our voices and our visible selves by wire or the ether, why shouldn't we smell and feel electrically all the way from New York to San Francisco? After all, the telephone was just a crazy notion only seventy years ago. So we prepare ourselves rather dubiously to sniff some future convention and ask why the ventilation is so poor or the air-conditioning system is not up to the mark, and sigh sympathetically as delegates in damp shirt sleeves mop their brows in the heat.

"And when the great decision is at last reached we shall all shake hands electrically with the successful candidate. What a handshake from fifty million, who will say: 'What a grip! Nothing flabby about that man!'"

—EXCERPT *from editorial, The New York Times.*



Federal Taxes or Rate Reductions?

A comprehensive analysis of the facts, arguments, and developments in the controversial "Detroit Edison Case," and its consequences.

By ERNEST R. ABRAMS

At no time since the founding of this nation have we had a scientifically sound tax structure. Never once in more than one hundred fifty years has Congress been guided by other than possible political impact in its designing of tax legislation. Getting the most money with the least squawking and, hence, with the least political reprecussion,always has been the guiding principle in formulation of Federal tax measures. As a result both the Federal Treasury and privately owned utilities are faced with a dilemma today.

Not that recent sessions of Congress are wholly to blame. In the thick of a global war, when the need of revenues is pressing, there is little time to bother with the niceties of taxation. But ever since formulation of the Revenue Act of 1941, Congress can be severely criticized for lacking the courage to call things by their right names. Particularly is this true of its treatment in that and subsequent tax bills of such fully regulated enterprises as public utilities.

Ever since 1907, public utilities, especially those rendering electric and gas service, have been regulated by state commissions to an ever-increasing extent, primarily to insure they earned no excess profits. So efficient has this regulation been that it is doubtful whether any sizable electric or gas utility in the country is today earning even that fair return on the present value of property devoted to public service, which the laws of most states provide they are entitled to earn, let alone any excess profits.

Yet, Congress, in the Revenue acts of 1941, 1942, and 1943, levied an "excess profits tax" against the ordinary, garden variety of utility profits, although this subterfuge of calling them "excess profits" no more changes their true character than an act of Congress calling yellow cats black would change their color.

Furthermore, Congress knew when it adopted these revenue acts, or at least the Senate Finance Committee and the

House Ways and Means Committee did, that regulated public utilities have no excess profits in the true meaning of the term. When the 1941 Revenue Act was pending in Congress, the true character of the excess profits tax was discussed by the Senate Finance Committee, of which Senator George was chairman, and the following comments appear in the record of the committee hearing:

> MR. FLETCHER: In other words, it is not an excess profits tax but a defense tax.
>
> CHAIRMAN GEORGE: That is what it is. It is not an excess profits tax at all.

Nevertheless, the mere fact that Congress did not have the foresight or courage to call this tax by its correct name has placed a formidable weapon in the hands of local politicians needing an issue on which again to ride into office, and they have been quick to seize upon the term "excess profits" to demand reductions in utility rates. For the unfortunate choice of this term by Congress and the fact that utilities are paying excess profits taxes to the Federal government give plausible support to their claim that utility rates are too high.

ALTHOUGH not the first to attempt diversion of the "excess profits" of its privately owned utilities from Federal coffers to municipal use or to consumers, the actions of the city of Detroit have been the best publicized. The story is worth reading, for here is a movement which hardly fits in with the war effort, but which, because of a recent decision of the Michigan Supreme Court, threatens to become statewide and to cost the Federal Treasury upwards of $30,000,000 in 1944.

In the fall of 1942, the city of Detroit, realizing that the Federal excess profits tax liability of the Detroit Edison Company probably would total between $6,000,000 and $6,500,000 in that year (actually, it totaled $8,200,000), petitioned the Michigan Public Service Commission for a reduction in rates charged by that privately owned utility of such proportions that the so-called excess profits would be dissipated and no Federal excess profits tax liability would be incurred. And while the commission still had this petition under consideration, the Office of Price Administration—of which Prentiss M. Brown, now chairman of Detroit Edison's board, was then chairman—intervened on the city's side by filing a petition in support of the proposed rate reduction.

On July 17, 1943, the Michigan commission, without specific discussion, overruled OPA's petition, and said in part in answer to the city's petition:

> Under the laws of the state of Michigan, a regulated utility is entitled to earn a fair return upon the present value of the property devoted by it to public service. Money that has been spent lawfully in rendering service constitutes no part of such a return. The dollar paid out for taxes is no more available as income and return than a dollar spent for labor or any other legitimate expense.
>
> We have repeatedly stressed the fact that we are a statutory body and possess only the powers conferred upon us by statute. We know of no statute giving us the power to forbid a company the right to charge as an operating expense any tax lawfully incurred by it. Likewise, we know of no statute giving us the power to forbid such a company the right to so charge any part of the tax so incurred as operating expenses.
>
> We therefore find that all taxes are a proper operating charge and they will be so considered in determining the income of the company in this case.

Accordingly, the commission de-

nied the city's plea for a reduction in Detroit Edison's rates.

THE city of Detroit then attempted the difficult feat of walking on both sides of the street at the same time. First, it appealed the decision of the commission to the Michigan Supreme Court, not on the issue of whether the excess profits tax should be eliminated from the expenses of the company, but on the issue of whether the commission had authority to and should consider and exercise its discretion in the matter. And, second, on November 30, 1943, the Detroit city council adopted an ordinance levying an excise tax of 20 per cent of the gross revenues of Detroit Edison Company and Michigan Consolidated Gas Company, but with a ceiling fixed by their excess profits tax liabilities to the Federal government. When first drawn, the ordinance had provided for a sliding scale of from 10 per cent to 30 per cent of gross revenues, and had sought to levy this tax against Michigan Bell Telephone Company and the Detroit revenues of American Telephone and Telegraph Company, but the latter two utilities were dropped from the final draft after Detroit's tax experts had expressed doubt as to the legality of such a levy.

Since the payment of this excise tax would have cost Detroit Edison upwards of $10,500,000 in 1943, if its full liability for Federal excess profits taxes was absorbed, at the same time making it liable, under the peculiar wording of the 1943 Revenue Act, to an added payment of some $1,500,000 to the Federal government, it immediately tested the constitutionality of the ordinance in the Wayne County Circuit Court. And on February 11, 1944, Michigan Consolidated Gas joined Detroit Edison in this court fight, basing its case on grounds similar to those raised in the former utility's suit.

Pointing out that the Detroit corporation counsel had stated to the council while the ordinance was under debate that it would have the effect of "rechanneling excess profits of utility companies from the Federal government to the city," Michigan Consolidated Gas stated that, if the ordinance were permitted to become effective, it would be forced to increase its residential rates by 47 per cent. Otherwise, if other served municipalities were to follow Detroit's example (as Hamtramck, Dearborn, and River Rouge

"DETROIT EDISON'S *excess profits taxes amounted to $1,420,000 in 1941, $8,200,000 in 1942, and $10,900,000 in 1943. Those of Consumers Power Company were $4,086,932 in 1941, $6,229,570 in 1942, and $8,386,584 in 1943. The excess profits taxes of Michigan Bell Telephone Company totaled $941,910 in 1941, $1,768,795 in 1942, and $4,349,755 in 1943. On the other hand, Michigan Consolidated Gas Company incurred no excess profits taxes in either 1941 or 1942, due to credits arising from its consolidation, while its 1943 figures have so far not been released.*"

already had done) there would be left only $516 in profits for distribution to stockholders at the close of 1944. And it noted further that in 1944 Detroit Edison and Michigan Consolidated Gas would be paying taxes equivalent to 6.4 per cent of Detroit's budget, whereas they would be forced to pay 24 per cent of the budget if the ordinance were enforced. The decision of the circuit court in these cases is expected any day, and may be handed down before this article reaches print.

IN the meanwhile—on May 17, 1944—the Michigan Supreme Court handed down a 4-to-3 decision on the appeal of the city of Detroit from the ruling of the public service commission, (54 PUR(NS) 65) in which it said in part:

> In the instant case the question narrows down to whether the commission in passing upon a petition to reduce the rate charged the consumer by the public utility should consider and exercise its discretion in respect to the exclusion in whole or in part of "excess profits" of the character hereinbefore noted. That such "profits" exist may or may not demonstrate that the earnings of the utility are excessive. . . .
>
> Without discretionary power to exclude any and all unnecessary elements of expense in determining a just and reasonable rate, the Michigan Public Service Commission would be an impotent body. It could not have been the intent of the legislature that the commission should lack necessary power to fix reasonable rates, and the commission should not be permitted to declare itself impotent. It clearly possesses such discretionary power; and that power should be exercised.
>
> The commission should not require the utility corporation to reduce its rates for the period during which it has paid excess profits taxes, nor for a period during which it may be liable for such payments on accrued taxes. It should take into consideration the usual elements of rate determination as well as obsolescence and depreciation of capital assets due to any extraordinary situations arising out of war conditions such as the effect of unusual and heavy wartime loads. It may also consider the time lag in a return to normal conditions and the period elapsing before a redetermination can again be made of a reasonable rate. The public should not be required to pay rates that will yield an extraordinary profit to the utility and the stockholders on the other hand *are at all times entitled to a fair return on their investment.* (Emphasis supplied.)

The decision has been quoted at some length because there seems to be a mistaken belief in some quarters that the court ordered the commission to force rate reductions of sufficient proportions to erase all Federal excess profits tax liability. In fact, such a reading of the decision finds some support in various statements of the court implying that the Federal excess profits tax liability of Detroit Edison was not an irreducible item of expense, that it could be eliminated in whole or in part through the device of rate reductions.

Although the court's decision apparently opened the way for Detroit to renew its fight for a reduction in electric rates sufficient to erase Detroit Edison's liability for excess profits taxes, city officials appear to be waiting for a decision of the circuit court on the legality of the 20 per cent excise tax. On the other hand, Detroit Edison Company petitioned the Michigan Supreme Court on June 5th for a rehearing of the case on the grounds that the decision of May 17th holds the commission has the authority to include or exclude war taxes along with all other expenses on their merits in fixing rates, but that the city of Detroit and the commission construe this as a hard and fast rule forbidding a utility to charge war taxes to expenses.

IN the meanwhile, the commission issued a notice to all gas, electric, and telephone utilities in the state, as soon as the court's decision had been digested, and to all municipalities served

Elimination of Excess Profits Tax

"IF liability for excess profits tax can be eliminated by reducing rates to cut down revenue—liability for ALL *corporate income taxes can be avoided by cutting down rates so as to do away with revenue entirely! Therefore, all corporate income taxes are 'avoidable' and the commission should therefore reduce utility rates until the company has no net income whatever. This would make the average utility function for charity."*

by them, setting a meeting for June 1st. This notice read:

> Every public utility subject to the jurisdiction of this commission is directed to prepare forthwith a forecast or estimate of all taxes as to which it will incur liability during the year 1944; and, if it appears to the utility from such forecast or estimate that it will incur a liability during the year 1944 to pay a Federal "excess profits tax," so called, then it is directed to prepare and file with this commission, not later than the first day of June, 1944, a statement containing its forecast or estimate of the Federal "excess profits taxes" as to which liability will be incurred by it during the year 1944, a statement of a possible adjustment of its rates and charges so as to avoid the incurring of such a liability, and a statement of the effect of such an adjustment of its rates and charges upon the income available to it as a return upon its investments.

Before examining the answers of the utilities to this notice, it might be well to indicate the Federal excess profits tax liabilities of the four largest utilities in the state in past years. Detroit Edison's excess profits taxes amounted to $1,420,000 in 1941, $8,200,000 in 1942, and $10,900,000 in 1943. Those of Consumers Power Company were $4,086,932 in 1941, $6,229,570 in 1942, and $8,386,584 in 1943. The excess profits taxes of Michigan Bell Telephone Company totaled $941,910 in 1941, $1,768,795 in 1942, and $4,349,755 in 1943. On the other hand, Michigan Consolidated Gas Company incurred no excess profits taxes in either 1941 or 1942, due to credits arising from its consolidation, while its 1943 figures have so far not been released.

ALTHOUGH each of the above four utilities submitted statements to the commission at its June 1st meeting, none of them would venture an estimate of their 1944 Federal excess profits tax liability in writing, although Detroit Edison verbally set its liability at $12,047,000 and

Michigan Consolidated Gas set its at $3,863,547, both based on the experience of lapsed months in 1944. But even these companies, along with the other two which made no verbal estimates, contended that their 1944 excess profits tax liabilities were dependent upon so many contingencies and uncertainties that no reliable estimates could be made. They further stated that since they could not estimate their 1944 excess profits tax liabilities with any degree of accuracy, they could not suggest any rate adjustments that would erase these liabilities. And when it came to the effect of such rate adjustment on earnings, all of them said that under the laws of Michigan they are entitled to a fair return on the present value of the property devoted to public service, that they were not now earning that fair return, and that no rate reductions should be made.

In addition, Detroit Edison and Michigan Consolidated Gas pointed out that should the circuit court uphold the legality of the Detroit ordinance levying a 20 per cent excise tax on their gross revenues, they would have no Federal excess profits tax liabilities whatever.

THE Michigan commission apparently had some difficulty making up its mind as to what the state supreme court intended in the Detroit Edison Case. In its original call to all Michigan public utilities to work out some formula for applying the court's ruling in the Detroit Edison Case to other utilities, the Michigan board indicated that it was preparing to reduce all utility rates by an amount sufficient to absorb such utilities' excess profits tax liability.

When the commission opened up the hearing on June 21st, involving the Detroit Edison Company, however, a more moderate interpretation of the court's opinion was indicated, as stated in PUBLIC UTILITIES FORTNIGHTLY, issue of July 20th, page 90. Chairman Shilson of the Michigan commission then declared:

> This case has been remanded to this commission by the supreme court for further consideration. The supreme court opinion was not a mandate to reduce rates, to abolish all so-called excess profits taxes; it held, however, that avoidable taxes should be considered and should be excluded from operating expenses.
>
> It also said the utility company is entitled to a reasonable return.
>
> Our problem at this time is to find the breaking point, if there is such a breaking point, where taxes may be avoided without impairing reasonable return.

Since this statement was, presumably, before the Michigan Supreme Court before it denied (without opinion) on June 30th the utility's petition for rehearing, it may reasonably be assumed that the Michigan court saw no need for further clarification of its opinion—in the light of the chairman's statement.

IF we take the view that utility rates should be arbitrarily reduced by the amount of the excess profits tax liability, regardless of the resulting effect on return to the investors, we could likely carry such a construction to an extreme so absurd as to make it clear that the court could never have intended it.

In other words, such an interpretation assumes that the court prohibited charging of all "avoidable expenses" to regular operating expenses. An excess profits tax is an "avoidable expense" because it can be eliminated by reducing rates and cutting down revenue on

which the tax is based. Therefore, the excess profits tax cannot be charged to operating expenses and must, accordingly, be taken care of out of earnings. This construction would leave the commission and the utility little choice except to reduce rates by a corresponding amount so as to eliminate the excess profits tax liability entirely.

But let us take that same construction a step further and we can easily see how absurd it is. Consider this: If liability for excess profits tax can be eliminated by reducing rates to cut down revenue—liability for *all* corporate income taxes can be avoided by cutting down rates so as to do away with revenue entirely! Therefore, all corporate income taxes are "avoidable" and the commission should therefore reduce utility rates until the company has no net income whatever. This would make the average utility function for charity.

Of course, the court may have intended to draw a line and say that excess profits taxes are "avoidable" but that corporate taxes are not. But its opinion made no such distinction. To avoid this absurdity it is necessary to go back to a more cautious construction.

The District of Columbia Public Utilities Commission early this year took a view that where excess profits taxes are not considered as operating expenses, the rate of return must be given corresponding consideration — meaning a more liberal return than if excess profits taxes were allowed to be charged to operating expenses. More recently the Missouri Public Service Commission in Public Service Commission *v.* Springfield Gas & Electric Co. 53 PUR(NS) 106, allowed a 6½ per cent return after a reduction had been made in revenues to absorb Federal excess profits taxes.

GETTING away from Detroit, the May 17th decision of the Michigan Supreme Court has had repercussions in many directions. For one thing, the idea of capturing the so-called excess profits tax liabilities of privately owned utilities for municipal use, or their dissipation through rate reductions or rate dividends to consumers, is spreading throughout the land.

Cleveland's city council recently adopted an ordinance requiring a rate reduction of $1,200,000 annually by Cleveland Electric Illuminating Company, the new rates to replace those now in effect under a 4-year agreement which expired July 7th. Cincinnati's city council was presented with an ordinance by its utilities committee calling for a flat reduction of 5 per cent in

¶ "IF *the funds now paid the Federal government in excess profits taxes by utilities must be diverted to consumers, utilities generally would prefer the diversion took the form of rate dividends or rebates, rather than rate cuts or city excise taxes. Rebates would leave existing rate structures undisturbed, thereby obviating the nasty problem of raising rates after the war, and they would avoid the need of local excise taxes which, once levied, might be hard to remove.*"

gas rates, or $400,000 annually. The Georgia Public Service Commission has ordered Georgia Power Company to reduce its rates by $1,058,000 a year, practically all of which will come out of excess profits taxes. A more recent order of the Alabama Public Service Commission calls for a reduction of $318,000 in annual charges made by Alabama Power Company. The New York Public Service Commission has just ordered a $224,200 rate reduction by New York State Electric & Gas Corporation.

And on June 15th, the New Jersey Board of Public Utility Commissioners ordered Public Service Electric & Gas Company to reduce its rates by $5,000,000 annually. Although no mention was made of diversion from the Federal Treasury to consumers of this sum, the fact that the utility has not contested the order would suggest that the major portion of this $5,000,000 will come out of funds that might otherwise have been paid to Uncle Sam as excess profits taxes.

The method of erasing excess profits tax liabilities of utilities has taken a somewhat different turn in the Pacific Northwest. As a result of an agreement with the Oregon Public Utilities Commissioner, Pacific Power & Light Company distributed $300,000 as a rate dividend to its electric customers in Oregon and Washington early in May. A short time later Northwestern Electric Company agreed with the Oregon commissioner to make cash refunds of $310,000 to its Oregon electric customers. And following an order by a Federal court restraining the Oregon commissioner from forcing a rate reduction on Portland General Electric, the commissioner and the company are negotiating for rate dividends to consumers, which are expected to total $750,000.

IF the funds now paid the Federal government in excess profits taxes by utilities must be diverted to consumers, utilities generally would prefer the diversion took the form of rate dividends or rebates, rather than rate cuts or city excise taxes. Rebates would leave existing rate structures undisturbed, thereby obviating the nasty problem of raising rates after the war, and they would avoid the need of local excise taxes which, once levied, might be hard to remove.

But utilities are not the only folks to suffer headaches as a result of these attempts to divert what Congress mistakenly has called "excess profits" in the revenue acts of the last three years from the Federal government to municipalities or consumers. As previously noted, the total amount of excess profits taxes that may be lost to the Federal Treasury in Michigan alone through conversion of Federal taxes into city taxes or rate cuts is around $30,000,000. And now comes an estimate from the Federal Power Commission that the aggregate of excess profits taxes due the Federal Treasury from utilities (presumably electric) in 1944 will approximate $250,000,000. Then, too, the Federal excess profits tax bill of the Bell Telephone system last year was $133,452,222, while non-Bell telephone utilities would substantially increase this amount paid by the telephonic industry. Add to that the excess profits tax bills of the two gas industries, water, and transportation, and the amount of revenue the Federal government might lose through dissi-

Will Local Tax Diversion Be Allowed?

"WILL the Treasury allow local tax diversion of Federal tax revenue from utilities? The Morgenthau statement did not cover this alternative plan for preventing payment of Federal taxes by public utilities through the simple device of levying city or local taxes ahead of the Federal government."

pation of all utility excess profits tax liabilities assumes staggering proportions.

IN a way the Treasury and other governmental departments or bureaus are partly responsible for this condition. When the city of Detroit was trying to obtain its rate reduction from Detroit Edison Company before the public service commission, there was placed in the record a private memorandum from the Internal Revenue Bureau, an agency of the Treasury Department, stating that the bureau had no objection to utility rate reductions, even though they would result in the curtailment or elimination of sums of revenue that might otherwise be subject to Federal excess profits taxes, provided they were ordered by regulatory authorities on the basis of proper findings.

Furthermore, in a memorandum supporting the 20 per cent excise tax on the gross revenues of Detroit utilities, Detroit counsel said, in part, drawing his conclusions from argument by OPA's counsel before the public service commission:

> The Federal government . . . has taken the stand that utilities are not an appropriate means for raising tax money for the Federal government, and the rates charged should not be high enough to provide for the acquisition of earnings upon which the utility must pay excess profits taxes.

After some study of this ticklish situation, the U. S. Treasury recently decided that it might as well stay neutral on Federal tax losses due to utility rate cuts. On June 18th Secretary of the Treasury Morgenthau took cognizance of recent press reports that the Treasury was contemplating some counteraction against the spreading "Detroit Edison doctrine" (whereby state regulatory commissions might be encouraged to order utility rate reductions in order to avoid or substantially reduce payment of excess profits taxes to the Federal government). Morgenthau did not deny that the possibility of losing many millions of dollars in Federal tax

revenue, through application of this doctrine, had given the Treasury some concern. His statement merely reflected the careful, and somewhat reluctant, conclusion of Treasury experts that, as a practical matter, there is little or nothing the Federal government can do about it. "The department," Mr. Morgenthau said, "does not wish to be considered as giving even tacit approval to the suggestion being made in some quarters that public utility rate reductions should not be put into effect because one result would be a loss of Federal revenue, particularly through reduction or elimination of Federal excess profits taxes."

PRACTICAL as well as political considerations probably explain the Treasury attitude. There is the obvious difficulty of Federal intervention in utility rate proceedings, throughout the states, in order to determine whether or not any resulting rate cut would be, in effect, an attempt to evade tax liability. Again, in an election year, the present administration, with its record of encouraging utility rate cutting, does not want to take the position that such cuts should be suspended simply to augment Federal tax revenues. Finally, the fair possibility of completing the European war within the current year, with resulting cutbacks in production, and the eventual change in the excess profits tax law itself, might well make any interference by the Treasury more trouble than it would be worth. In other words, the current year 1944, with its business production peaks, may well be the last big "yield year" on excess profits tax collections for some time. Thus, even if a stampede of local regulatory authorities should develop to gain the advantage of the "Detroit Edison doctrine," it would not reach serious proportions before 1944 Federal tax liability becomes absolute.

Will the Treasury allow local tax diversion of Federal tax revenue from utilities? The Morgenthau statement did not cover this alternative plan for preventing payment of Federal taxes by public utilities through the simple device of levying city or local taxes ahead of the Federal government. (This alternative has, as we have noted, already been attempted by Detroit and other Michigan cities, just in case the rate reduction method of diverting utility taxes from the U. S. Treasury might not stick.) It is believed that under such circumstances the U. S. Treasury would probably take a similar position to that expressed by Morgenthau with respect to local rate reductions.

In other words, city and local taxes, assuming they were validly imposed on utilities and upheld by the courts, would be permitted by the Federal government to take precedence over any Federal corporate tax liability for utilities.

If there's a moral to this story, it probably is that all of us, Congress included, should be careful to say exactly what we mean. This whole sorry mess sprang from sloppy language in the Revenue acts of the past three years—from the labeling as "excess profits" of earnings which were in no way excess—from designating as an "excess profits tax" what rightfully should have been called a "war tax."

Any Business Can Be Made A Public Utility

The author thinks the Supreme Court can do it and that the court's action one way or the other depends upon the changing "climate of opinion."

By JOSEPH P. O'CONNELL
CHAIRMAN, CONNECTICUT PUBLIC UTILITIES COMMISSION

In the March 16, 1944, issue of the FORTNIGHTLY[1] there appeared an article by Larston D. Farrar entitled: "Can Any Business Be Made a Public Utility?" That particular question is an intriguing one in the light of recent precedent-breaking decisions of our Supreme Court.

First of all, the answer to the question, in the form presented, is, of course, yes, positively. In the article itself, on page 355, the author presents the question in another way; that is, "Will every major business, inevitably, be considered not only by legislatures but by the courts as a business charged with the public interest and thus subject to regulation?" The answer to this question is not so easy —no one, not even the Supreme Court itself, would hazard an opinion on that subject. It all depends, to filch an arrow from the quiver of social philosophers, on the "climate of opinion." This "climate of opinion" is reflected in every decision of every judicial tribunal and administrative board. Of course, the climate changes, not by reason of any meteorological disturbance, but by economic and social disturbances, as indicated by some of the highest judicial pronouncements.

Why can one be so positive in answering "yes" to the original question? Inasmuch as any such question will inevitably involve an alleged constitutional right, the Supreme Court must finally determine that right, and make its interpretation of the Constitution. It can declare any particular business a public utility, or rather that any particular business is "affected with the public interest" and, therefore, subject to regulation as a public utility. The only appeal for relief would then be to the legislature.

It no longer makes any difference whether you call the business a pub-

lic utility or designate it as a business affected with the public interest or a business in which the public has an interest. Indeed, in the Nebbia Case[2] the court said: "We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice."

For years the test applied in determining whether a business could be subjected to regulation was whether or not it was "affected with a public interest." The earliest discussion of the subject was by Lord Hale in De Portibus Maris.[3] That learned Justice, with great care, distinguished between property *jus privati* and *jus publici.* The test applied by him has been followed quite generally by our courts. His treatise has been quoted time and again by our United States Supreme Court.

Said Lord Hale: "A man, for his own *private advantage,* may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree . . . for he doth no more than is lawful for any man to do, *viz.*: makes the most of his own. . . . If the King or subject have a *public wharf,* unto which all persons that come and unload or load their goods as for the purpose, because they are the wharfs only licensed by the Queen, . . . or because there is no other wharf in that port, . . . in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate . . . For now the wharf, and crane, and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest." (Italics supplied.)

THE businesses so affected in Lord Hale's time were, of course, not many. It is, therefore, not surprising that the scope of regulation has greatly expanded; and it is interesting, in this connection, to note the changes in the climate of opinion in the courts—particularly the Supreme Court—with reference to the scope of regulation and the reasons therefor.

In 1871, the general assembly of Illinois declared the business of storage of grain in warehouses at Chicago and certain other places to be a business "affected with the public interest" and fixed maximum charges. This was challenged as unconstitutional, but the Supreme Court[4] as we know upheld the statute, citing Lord Chief Justice Hale's views in De Portibus Maris. The court stated that the elevator operators of Chicago stood in the gateway of commerce and exacted toll of all who passed; that they constituted a virtual monopoly; that the regulation of these warehouses was a thing of domestic concern.

"Property does become clothed with a public interest," said the court, "when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to

the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use he must submit to the control."

UP to that time it was generally agreed that the right to regulate a supposedly private business, such as that involved in the Munn Case, was conditioned upon some privilege conferred upon the owner, by which the value of the business was enhanced. But now the court took cognizance of the fact that a virtual monopoly existed; that competition was nonexistent or ineffectual; and that regulation was necessary to curb the evils of monopoly. Thus, the climate of opinion of long standing concerning property *jus privati* and *jus publici* had changed; but the decisions of the court indicating this change were not unanimous and the dissenting opinions were many and strong. Note Justice Fields' vigorous dissenting opinion in this case.

"If this be sound law," said he, "if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the state are held at the mercy of a majority of its legislature. The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, anything like so great an interest; and, according to the doctrine announced, the legislature may fix the rent of all tenements used for residences, without reference to the cost of their erection. If the owner does not like the rates prescribed he may cease renting his houses. He has granted to the public, says the court, an interest in the use of the buildings, and 'He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.' The public is interested in the manufacture of cotton, woolen, and silken fabrics; in the construction of machinery; in the printing and publication of books and periodicals; and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion; and the doctrine which allows the legislature to interfere with and regulate the charges which the owners of property thus employed shall make for its use, that is, the rates at which all these different kinds of business

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¶ *" 'WILL every major business, inevitably, be considered not only by legislatures but by the courts as a business charged with the public interest and thus subject to regulation?' The answer to this question is not so easy—no one, not even the Supreme Court itself, would hazard an opinion on that subject. It all depends, to filch an arrow from the quiver of social philosophers, on the 'climate of opinion.' "*

shall be carried on, has never before been asserted, so far as I am aware, by any judicial tribunal in the United States."

WITH the Munn Case as a precedent, it was not difficult for the Supreme Court in the Budd Case[5] to declare that the business of elevating, weighing, and discharging grain from ships, was a business "affected with a public interest." Justice Brewer in the Budd Case, as did Justice Fields in the Munn Case, dissented sharply, showing the concern he felt over the decision — the same concern now evinced by many persons over recent pronouncements of the court.

"Surely the matters, in which the public has the most interest," said he, "are the supplies of food and clothing; yet can it be that by reason of this interest the state may fix the price at which the butcher must sell his meat, or the vendor of boots and shoes his goods? Men are endowed by their Creator with certain unalienable rights, 'life, liberty, and the pursuit of happiness,' and to 'secure' not grant or create these rights governments are instituted. That property which a man has honestly acquired he retains full control of, subject to these limitations: first, that he shall not use it to his neighbor's injury, and that does not mean that he *must use it for his neighbor's benefit* (italics supplied); second, that if he devotes it to a public use, he gives to the public a right to control that use; and third, that whenever the public needs require, the public may take it upon payment of due compensation. It is suggested that there is a monopoly, and that that justifies legislative interference. There are two kinds of monopoly; one of law, the other of fact. The one exists when exclusive privileges are granted. Such a monopoly, the law which creates alone can break; and being the creation of law, justifies legislative control.

"A MONOPOLY of fact anyone can break, and there is no necessity for legislative interference. It exists where anyone by his money and labor furnishes facilities for business which no one else has. A man puts up in a city the only building suitable for offices. He has, therefore, a monopoly of that business; but it is a monopoly of fact, which anyone can break who, with like business courage, puts his means into a similar building. Because of the monopoly feature, subject thus easily to be broken, may the legislature regulate the price at which he will lease his offices? So, here, there are no exclusive privileges given to these elevators. They are not upon public ground. If the business is profitable, anyone can build another; the field is open for all the elevators and all the competition that may be desired. If there be a monopoly, it is one of fact and not of law, and one which any individual can break.

"The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and

Regulation of Warehouses

"IN 1871, the general assembly of Illinois declared the business of storage of grain in warehouses at Chicago and certain other places to be a business 'affected with the public interest' and fixed maximum charges. This was challenged as unconstitutional, but the Supreme Court . . . stated that the elevator operators of Chicago stood in the gateway of commerce and exacted toll of all who passed; that they constituted a virtual monopoly; that the regulation of these warehouses was a thing of domestic concern."

the compensation to be paid for the use of all property? . . .

"I believe the time is not distant when the evils resulting from this assumption of a power on the part of government to determine the compensation a man may receive for the use of his property, or the performance of his personal services, will become so apparent that the courts will hasten to declare that government can prescribe compensation *only when it grants a special privilege,* as in the creation of a corporation, or when the service which is rendered is a public service, or the property *is in fact devoted to a public use."* (Italics supplied.)

Were Justices Brewer and Fields living today they would probably stand aghast at later decisions of their court, for the "climate of opinion" has greatly changed.

THIRTY-TWO years later the Supreme Court was asked to determine the validity of a Kansas statute declaring the business of meat packing to be "affected with the public interest." The statute created an industrial court of three judges and vested it with power, among other things, to fix wages, if necessary for the protection of the general welfare which might be endangered by controversy between employer and employee. The company refused to comply with an order of this industrial court and challenged the constitutionality of the act.[6] Chief Justice Taft delivered the opinion of the court. He reviewed the law concerning businesses said to be clothed with a public interest justifying some public regulation, but held that meat packing was not a business subject to regulation within the rule.

"It is manifest," said he, "from an examination of the cases cited . . . that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry. . . .

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation."

In this decision the court refused to extend the lists of businesses "affected by a public interest" but admitted that the process should be one of "exclusion and inclusion, and to gradual establishment of a line of distinction," leaving open the door for the consideration of future cases.

FOUR years later[7] the court reaffirmed that doctrine and said again: " . . . the mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation."

In that case the Supreme Court was called upon to test the constitutionality of a law passed by the New York legislature fixing the price of theater tickets in order to safeguard the public against fraud, extortion, exorbitant rates, and similar abuses. The court, speaking through Justice Sutherland, cited the Munn Case and the Wolff Packing Company Case and found no room in these classes for theater ticket brokers. Justice Holmes, however, dissented.

"I am far from saying," he declared, "that I think this particular law a wise and rational provision. That is not my affair. But if the people of the state of New York, speaking by their authorized voice, say that they want it, I see nothing in the Constitution of the United States to prevent their having their will."

This indeed was a broad pronouncement and the same or similar language was used by Justice Brandeis in the New State Ice Company Case, decided by the court five years later.

JUSTICE Stone also dissented from the majority opinion and urged caution against the assumption that the classes of business subject to regulation set up in the Wolff Packing Case had become complete or fixed and that there may not be brought into it new classes of businesses or transactions not hitherto included. The dissenting opinions in this case, while not changing the climate of opinion, at least indicated a trend toward opening the door to admit new classes as spoken of by Justice Taft.

In 1928, one year later[8] the court held that the business of an employment agency is not affected with a public interest so as to enable the state to fix the charges to be made for the services rendered. The opinion, again by Justice Sutherland, was a reiteration of the law laid down in the Tyson Case, and the court adhered to its former rulings. This time Justices Stone, Brandeis, and Holmes dissented.

In his dissenting opinion, concurred in by Justices Holmes and Brandeis, Justice Stone said, *inter alia:* "To overcharge a man for the privilege of hearing the opera is one thing; to control the possibility of his earning a livelihood would appear to be quite another. And I shall not stop to argue that the state has a larger interest in seeing that its workers find employment without being imposed upon, than in seeing that its citizens are entertained."

He was contrasting this with the Tyson Case, hereinbefore referred to, and recognized the difference in the two cases. It may be noted here that Justice Stone's reason for enlarging the class was not identical with that of Justices Holmes and Brandeis. The latter would not interfere with the state regulation even though it be "unwise and foolish" if not "capricious nor arbitrary"; but Justice Stone took the position that the specific evil involved in the case could be cured only by a specific remedy; namely, to limit or fix the price of the service rendered. The growing change of opinion was now apparent but the complete change was yet a few years off.

The New State Ice Company Case referred to[9] came to the Supreme Court five years after the Tyson Case and this time the court excluded the manufacturing of ice from classes of business subject to regulation. Justice Sutherland delivered the opinion of the court, which was a reaffirmation of the doctrine enunciated in the Tyson Case.

"It may be quite true," said the court, "that in Oklahoma ice is not only an article of prime necessity, but indispensable; but certainly not more so than food or clothing or the shelter of a home. . . . Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable, unnecessary restrictions upon them.' "

Mr. Justice Brandeis, again dissenting, echoed the opinion of

¶ "Mr. Justice Brandeis . . . *echoed the opinion of Justice Holmes' dissent in the Tyson Case five years before. Justice Brandeis stated that, while a legislature cannot by mere legislative fiat convert a business into a public utility, the conception of a public utility not being a static thing, the action of the state must be held valid unless clearly arbitrary, capricious, or unreasonable. He said: 'Whether the grievances are real or fancied, whether the remedies are wise or foolish, are not matters about which the court may concern itself.'* "

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So again then, according to the court, the action may not be arbitrary, capricious, or unreasonable, but it may be unwise and foolish.

Still the climate of opinion had not changed though Justices Stone, Holmes, and Brandeis were pointing toward the change which was to come nine years later.

In March, 1934, the case of Nebbia *v.* New York[10] was considered by the court. Nebbia was convicted of selling milk at a price less than that prescribed by the legislature.

THE court, upholding the conviction and answering the argument that the public control of rates or price is unconstitutional save as applied to businesses affected with a public interest, said: "We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself."

NOW all legal precedents concerning the right of the state to regulate utilities or businesses "affected with a public interest" were thus swept away together with *stare decisis,* lock, stock, and barrel. No longer need the state inquire whether the business fell within the classes established by Justice Taft in the Wolff Case as public callings. It made no difference, if the law passed had a reasonable relation to a proper legislative purpose and if it were not arbitrary or discriminatory. Once that is judicially determined the court is rendered *"functus officio."*

The complete answer to the question: Can Any Business Be Made A Public Utility? depends on the climate of opinion; and the climate of opinion now took an abrupt if not a sudden turn.

The climate of opinion on the subject of regulation of employment agencies definitely changed in 1941

Regulation of Prices

"THE courts have recognized that, though they [theater ticket brokers, employment agencies, and the production of milk] are not utilities in the ordinary sense of the term, nor businesses 'affected with a public interest' in the hitherto accepted sense of that term, they are businesses which concern the welfare of the public; and that the regulation of prices is the thing aimed at rather than the broad regulation attaching to public utilities."

when the court had before it the case of Olsen *v.* Nebraska.[11] The question involved a Nebraska statute fixing the maximum compensation a private employment agency may collect, the same question involved in the Ribnick Case. The court now adopted the philosophy enunciated in the dissenting opinion of Justice Holmes in the Tyson Ticket Case, Justice Brandeis in the Oklahoma Ice Case, and of Justice Stone in the Ribnick Case.

THE court left no doubt that the climate of opinion had changed. It categorically disavowed and rejected the decision in the Ribnick Case, saying: "The drift away from Ribnick *v.* McBride (1928) 277 US 350, has been so great that it can no longer be deemed a controlling authority."

Note in the following language the similarity in thought and expression with that of the three justices named above in the earlier cases referred to: "We are not concerned," said the court, "with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which should be left where it was left by the Constitution—to the states and to Congress."

Thus another business, that of employment agencies, was now taken into the classes of business enumerated by Justice Taft as subject to regulation. This decision poses another interesting question: Would the Supreme Court, in the light of this decision, reverse itself again and go further to extend the classes to include ticket brokers which it had denied in the Tyson Case? It will be remembered that Justice Stone in the Ribnick Case differentiated b e t w e e n employment agencies and ticket brokers.

AT least one state court relying on the Olsen decision has already held that a state statute regulating the price of theater tickets is now constitutional and cited that case in its deci-

sion.[12] In this case the court upheld the constitutionality of the New York statute and based in decision on the Nebbia and Olsen cases. It said, in effect, that notions of public policy embodied in the earlier decisions (of which the Tyson Case was one) have ceased to be the test of constitutionality.

So it appears, as Justice Brandeis stated in the Ribnick Case, that "what constitutes a business affected with a public interest" is not a static thing.

It would seem then that now a fourth class has been added to those set up by Justice Taft in the Wolff Packing Case as subject to regulation. While there has been no judicial designation of this class, it may be said to include "those businesses, which, though not heretofore recognized as businesses of public concern, are beset with economic and social ills and evils which the police power is unable to cure or correct," such as theater ticket brokers, employment agencies, and the production of milk.

THE courts have recognized that, though they are not utilities in the ordinary sense of the term, nor businesses "affected with a public interest" in the hitherto accepted sense of that term, they are businesses which concern the welfare of the public; and that the regulation of prices is the thing aimed at rather than the broad regulation attaching to public utilities. Will there be additional classes or an expansion of those already formed? The statement of Justice Brandeis in the Ribnick Case quoted above is a partial answer—the climate of opinion is the complete answer.

The response of the judiciary to what has been called the climate of opinion is noted not only in the scope of enterprises embraced in the utility concept, but also in the conclusion of the court as to what constitutes fair treatment for a regulated utility corporation.

For forty-four years the Supreme Court upheld the doctrine of fair value as enunciated in the celebrated case of Smyth *v.* Ames.[13]

Time and again, although they characterized the elements of the fair value doctrine in that case as conjectural,[14] vague,[15] and wild uncertainty,[16] the court adhered to its early ruling and stood at cloying salute to that doctrine.

IT was evident over ten years ago, however, that the courts or at least some of the justices thereof were beginning to look askance at the validity of the fair value doctrine, and in 1933 Chief Justice Hughes in the Los Angeles Gas & Electric Company Case[17] said:

"We do not sit as a board of revision, but to enforce constitutional rights. . . . The legislative discretion implied in the rate-making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory . . . And mindful of its distinctive function in the en-

forcement of constitutional rights, the court has refused to be bound by any artificial rule or formula which changed conditions might upset."

Two years later in the case of West Ohio Gas Co. *v.* Ohio Pub. Utilities Commission,[18] Justice Cardozo said, *inter alia*: "This court does not sit as a board of revision with power to review the action of administrative agencies upon grounds unrelated to the maintenance of constitutional immunities. . . . Our inquiry in rate cases coming here from the state courts is whether the action of the state officials *in the totality of its consequences* is consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation. If this level is attained, and attained with suitable opportunity through evidence and argument . . . to challenge the result, there is no denial of due process, *though the proceeding is shot through with irregularity or error.*" (Italics supplied.)

It will be interesting to keep in mind this language of the court and compare it with the language used in two later cases when the climate of opinion did definitely change.

And again three years later in the case of California R. Commission *v.* Pacific Gas & E. Co.[19] Chief Justice Hughes said: "While the court has frequently declared that 'in order to determine present value, the cost of reproducing the property is a relevant fact which should have appropriate consideration,' we have been careful to point out that 'the court has not decided that the cost of reproduction furnishes an exclusive test' and in that relation we have 'emphasized the danger in resting conclusions upon estimates of a conjectural character.' "

The court also quoted from the opinion in the West Ohio Case, *supra,* to the effect that there is no denial of due process, *though the proceeding is shot through with irregularity or error,* provided the action of the state officials *in the totality of its consequences* is consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation. (Italics supplied.) Thus, while the court continued to adhere to the ruling of Smyth *v.* Ames, there was, I believe, a tendency, or at least a desire, to swing away from the ruling in that case.

This swing was to become complete four years later in the case of the Federal Power Commission *v.* Natural Gas Pipeline,[20] decided in 1942, where the court held: "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas.

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¶ "For *forty-four years the Supreme Court upheld the doctrine of fair value as enunciated in the celebrated case of Smyth* v. *Ames. Time and again, although they characterized the elements of the fair value doctrine in that case as conjectural, vague, and wild uncertainty, the court adhered to its early ruling and stood at cloying salute to that doctrine.*"

Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances."

Justices Black, Douglas, and Murphy, in a concurring opinion, went further and, as if to leave no doubt of their interpretation of the opinion, said: " . . . this case starts a new chapter in the regulation of utility rates . . . the opinion of the court erases much which has been written in rate cases during the last half century . . . this is an appropriate occasion to lay the ghost of Smyth *v.* Ames, which has haunted utility regulation since 1898."

Now, again, the climate of opinion had definitely changed regarding public utility regulation, although it was believed by some that even this case did not settle the question finally because the majority opinion did not embrace the language of the three justices named above. Any doubt that the court meant that very thing, however, was removed in the recent case of the Hope Natural Gas Company decided by the United States Supreme Court on January 3rd of this year.[21]

"If the total effect of the rate order cannot be said to be unjust and unreasonable," said the court in this case, "judicial inquiry under the act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important."

HERE we find much similarity in thought and reasoning, though with some variation of expression, to that of Justice Cardozo in the West Ohio Case referred to above and that of Chief Justice Hughes in the Los Angeles Gas & Electric Case and the Pacific Gas and Electric Case.

The impact of this climate of opinion may be observed in the determination of what constitutes a regulated utility and, as indicated hereinbefore, in the court decisions as to what constitutes fair treatment for the regulated utility. In short, the courts illustrate the same sort of crystallization of public opinion that has given us our system of common law.

Footnotes

[1] PUBLIC UTILITIES FORTNIGHTLY. Vol. XXXIII, No. 6, p. 345.
[2] Nebbia *v.* New York (1934) 291 US 502, 2 PUR(NS) 337, 349.
[3] 1 Hargrave Law Tracts 78 (1676).
[4] Munn *v.* Illinois (1877) 94 US 113, 126, 140, 24 L ed 77.
[5] Budd *v.* New York (1892) 143 US 517, 550, 36 L ed 247.
[6] Wolff Packing Co. *v.* Court of Industrial Relations, 262 US 522, PUR 1923D 746, 751.
[7] Tyson & Brother *v.* Banton (1927) 273 US 418, 431, 447, 71 L ed 718.
[8] Ribnick *v.* McBride, 277 US 350, 373, 72 L ed 913.
[9] New State Ice Co. *v.* Liebmann, 285 US 262, PUR 1932B 433, 438, 443.
[10] 291 US 502, 2 PUR(NS) 337, 349.
[11] 313 US 236, 244, 246, 85 L ed 1305.
[12] Kelly-Sullivan, Inc. *v.* Moss (1943) 39 NY Supp (2d) 797.
[13] (1898) 169 US 466, 42 L ed 819.
[14] Los Angeles Gas & E. Corp. *v.* California R. Commission, 289 US 287, 307, 317, PUR 1933C 229; Dayton Power & Light Co. *v.* Ohio Pub. Utilities Commission (1934) 292 US 290, 311, 3 PUR(NS) 279.
[15] Columbus Gas & Fuel Co. *v.* Ohio Pub. Utilities Commission (1934) 292 US 398, 411-413, 4 PUR(NS) 152.
[16] Missouri ex rel. Southwestern Bell Teleph. Co. *v.* Public Service Commission, 262 US 276, PUR 1923C 193.
[17] 289 US 287, PUR 1933C 229, 240.
[18] (1935) 294 US 63, 6 PUR(NS) 449, 453.
[19] (1938) 302 US 388, 21 PUR(NS) 480, 487.
[20] 315 US 575, 42 PUR(NS) 129, 139, 147.
[21] 320 US 591, 51 PUR(NS) 193, 200.

Wire and Wireless Communication

WASHINGTON observers noted with considerable interest that the FCC, in a series of decisions involving the transfer of radio broadcasting stations, was abstaining from raising any objection to the price paid for such facilities. This was taken in some quarters as evidence that the FCC was "turning to the right," to the extent that it is now disposed to leave to Congress controversial policy decisions instead of assuming jurisdiction in the absence of congressional intent.

In a letter to the chairmen of the House and Senate Interstate Commerce committees, FCC Chairman Fly said that unless instructions are forthcoming from Congress, the FCC feels it is its function to approve sales of broadcast stations, even though prices may be "inordinately high." During the month of July the FCC approved a number of station transfers involving $7,000,000 at prices which were criticized by dissenting Commissioner Durr as being too high. Commissioner Durr made public a memorandum which set forth his reasons for dissenting from the sale or transfers in three cases: the sale of WINX, Washington, D. C., to *The Washington Post* for $500,000; sale of WQXR to *The New York Times* for approximately $1,110,000; and the sale of WJLD of Bessemer, Alabama, for $106,000.

Durr said that the proposed purchase price in these cases exceeded original investments by such wide margin as to indicate that the purchasing parties were paying for a "frequency" more than for the station property itself. Durr also objected to transfers involving sale of radio stations to newspaper publishers, including the sale of WJJD of Chicago to Marshall Field, publisher of the *Chicago Sun* and *PM*, for $750,000. The other members of the commission, however, were understood to have voted favorably.

Chairman Fly, in his letters to Senator Wheeler and Representative Lea, referred to the "tremendously high prices" which stations now are selling for and pointed out that it was the commission's policy to disapprove transfers which obviously represent the activities of a promoter or broker "who is simply acquiring licenses and trafficking in them." Under the present state of the law, however, he said, it was not clear that the FCC "has either the duty or the power to disapprove of a transfer merely because the price is inordinately high," even though it might be fairly assumed that a substantial value is to be placed on an intangible asset; namely, the frequency.

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WAR PRODUCTION BOARD'S Telephone Operations Industry Advisory Committee made the following recommendations at its recent meeting in Washington, D. C.:

1. Recommended to the Communications Division of the Office of War

Utilities that the existing restrictions on installation of extensions, portable telephones, and extension gongs be retained in Order U-2. This recommendation was made because available supplies of telephone equipment continue to be short. Emergency stocks of certain types of this equipment are being held by the Bell system for use in restoring service in emergencies.

2. Committee members urged that some of this equipment be released for immediate use. But it was agreed that toll equipment and certain exchange central office equipment should be kept in reserve against emergencies.

3. The committee unanimously agreed that processing of appeals filed under U-2 should continue to be handled in Washington rather than decentralized through local WPB offices, OPA rationing boards, or telephone companies. This does not preclude, however, individual operating companies at their discretion from explaining to prospective appellants that WPB regulations and practice were such that the filing of certain types of appeals would be futile.

* * * *

A HOUSE committee last month seized foreign broadcast files found in the rooms of two Japanese employed by the government. The committee, headed by Representative Clarence F. Lea, Democrat of California, chairman, investigating the Federal Communications Commission, called an emergency hearing to question Fred Nitti, a native of Japan, and John Kitasaka, American-born Japanese.

Nitti is employed by the Office of Strategic Services in "highly confidential" work, he testified. Kitasaka edits scripts of Radio Tokyo broadcasts in the foreign broadcast intelligence division of the FCC. Both were in a relocation camp after Pearl Harbor.

J. J. Sirica, committee counsel, brought out that Kitasaka took to his rooms four copies of foreign broadcasts which were listed as "restricted" and that Nitti had access to them.

Kitasaka said he had the copies only to "study them," to help him in his work. Nitti said they aided him also in what he was doing for the highly secret OSS. Both asserted they were loyal to the U. S. Charles R. Denny, counsel of the FCC explained to Chairman Lea that the term "restricted" did not mean "confidential." Mr. Denny said that Kitasaka did nothing wrong in taking the files home, but he should not have made them available to anyone else.

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RUSSIA received 260,000 field telephones and 830,000 miles of wire in three years through Lend-Lease, according to a recent electrical industry announcement.

* * * *

J. L. EGAN, vice president of Western Union, recently upheld his company's acceptance of President Roosevelt's congratulatory telegram to Senator Truman on the grounds that "presumably it constituted an exception" to an official ban on such messages.

"If the President had the authority to authorize issuance of the ban he has the authority to modify, alter, or rescind it," Mr. Egan said.

The President's message to Senator Truman, Democratic vice presidential nominee, sent to him in Chicago on July 22nd, said:

> I send you my heartiest congratulations on your victory. I am, of course, happy to have you run with me. Let me know your plans. I shall see you very soon.
>
> FRANKLIN D. ROOSEVELT

The ban against congratulatory telegrams was established November 5, 1942, as a result of a presidential order delegating such powers to the Board of War Communications.

Mr. Egan said the telegram originally was dispatched by a company operator in Washington without the knowledge of any supervisory employee after it had been received over a private wire from the White House.

Western Union refused to send a similar telegram from Wendell L.

Willkie congratulating Governor Thomas E. Dewey on his designation as the Republican presidential candidate.

Clifford J. Durr, Federal Communications commissioner, said in Washington recently that he knew of no special wartime authority giving the President the privilege of sending such a message.

* * * *

RATES for overseas radiotelephone service to Argentina, Brazil, Chile, Peru, Colombia, and Haiti were lowered generally beginning August 1st, according to an announcement of the American Telephone and Telegraph Company. Several such reductions have been made since this service was first established with South America in 1930.

The rates for a 3-minute week-day call between New York and any point in Argentina, Brazil, Chile, and Peru are to be decreased by $3 and will be $12. Between New York and both Colombia and Haiti such a call will cost $9.

Certain reductions have also been made in the overseas radiotelephone rates to Puerto Rico from about one-third of the forty-eight states. As an example of the reductions, the rate for a 3-minute day call between Washington, D. C., and Puerto Rico has become $7.50, a decrease of 75 cents.

For all of the above countries lower rates apply on Sunday and for Puerto Rico there are also lower rates at night.

* * * *

WITH traditional devotion to duty, telephone employees rallied for immediate service after the Port Chicago munitions explosion, which occurred at 10:19 P. M. on July 17th, and saw to it that at no time was the wrecked town out of telephone communication with the outside world. Within a few minutes after the explosion, the Pacific Telephone & Telegraph Company crews and trucks from surrounding towns were on their way to the scene of disaster to render immediate assistance in restoring communication facilities, to make repairs, and to get the telephone calls for aid flowing over the wires.

Repair crews, working under emergency lights throughout the night, had restored all telephone trunks to Port Chicago by 11:20 the following morning, by which time also a substantial number of the 212 telephones served by the local exchange were in working order.

The explosion moved the switchboard a distance of about two feet and ringing power failed. (Emergency hand generators on switchboards were used.) The telephone building, however, was not seriously damaged, and one long-distance circuit miraculously remained in service. This line was immediately made available to the military authorities for emergency use.

The telephone operator on duty in the Port Chicago central office at the time of the explosion was blown across the room, suffered shock and minor injury, but quickly returned to her position at the board and resumed handling calls. Another operator, housed on the premises, suffered bruises and a broken rib. The chief operator, returning to the office from a civic meeting, suffered cuts from flying glass but despite injuries reported immediately and took charge. Within a few minutes, operators voluntarily began to arrive at this and other telephone exchanges in the affected region, ready to take over whatever assignments were necessary to reëstablish disrupted service and get the message through.

By 3:30 the morning of July 18th, Port Chicago operators were handling calls over several circuits which telephone repair crews had restored to Martinez and Pittsburg, the nearest neighboring exchanges.

Telephone company employees acted as messengers to relay messages to points where telephone communication was impossible.

THE exchange plant suffered severe damage. Aerial cable to the ammunition depot was destroyed for a distance of about 500 feet and much of the other exchange outside plant was badly damaged. Aerial wire on the toll lines serving Port Chicago was damaged from

flying shrapnel and débris for a distance of about three miles.

Summarizing the effect of the explosion on telephone property, the company stated that no damage was done to its plant in exchanges other than Port Chicago, although windows were broken in telephone offices in Pittsburg, Martinez, and Vallejo.

Chief operators in Port Chicago, Pittsburg, and Martinez exchanges stated that public coöperation had been "splendid." With emergency calls flooding the switchboards, operators asked persons placing what were obviously "curiosity" calls if their messages were urgent. Many replied in the negative and said they would gladly call later.

* * * *

WITHIN a month important steps will be taken in Washington in regard to a Western Hemisphere agreement on communications, it was learned recently. The Western Hemisphere agreement probably will be laid before an international postwar conference as a pattern for the whole globe, State Department officials believe.

The communications question, which involves safety of air transportation, as well as cable, telegraph, etc., has become so important that both Democratic and Republican parties this year included planks calling for freedom of postwar communications.

State Department representatives recently returned from Colombia, Venezuela, Brazil, Uruguay, and Chile where they attempted to obtain agreements that northbound and southbound communications rates would be the same. The FCC has reduced the rates from the United States to Latin America, but each Latin American country had to act on northbound rates.

Major Landry S. Concaelves, director of Post & Telegraph of Brazil, was expected in Washington late last month to discuss in detail inter-American communications. The subject was said to be of such importance to American industry, as well as to government, that all government agencies concerned with communications would confer with industries involved in Washington on August 11th and 12th.

At the last international telecommunications conference held in Cairo in 1938, frequencies were assigned on the basis of a spectrum going up to 200,000 kilocycles. Now, however, so great has been the progress in communications with the forced draft of war, that all experts are beginning to talk of a spectrum ranging up to not less than 800,000 kilocycles. The technical possibilities are "miraculous," experts assert.

* * * *

JAMES LAWRENCE FLY, chairman of the Federal Communications Commission, last month urged a system of uniform and low press rates throughout the world, as a means of encouraging the flow of news to all parts of the world in the postwar period.

In an article in the August issue of *Free World* magazine, Fly said that low uniform cable rates for press copy could be arranged as readily as low standard postal rates have been. As an example of such a system, he cited the British policy of a uniform cable rate to any part within the Empire.

The United States must establish a form of uniform cable rates for news, he added, if we do not wish to permit foreign governments and foreign agencies, which are seeking to control the news of the world, "to tell—or fail to tell—the American story."

* * * *

FOR the first time in eastern railroad history, the operations of a switching engine were controlled and directed by radio under working conditions in the Baltimore & Ohio yards at Baltimore on July 27th.

Engineers and railroad officials called the test a success and predicted that radio control in future would substantially reduce time consumed in assembly and distribution of freight trains in the yards and held a promise of operational and safety control of freight and passenger movement on the main lines.

Financial News and Comment

By OWEN ELY

Stocks of Manufactured Gas Companies

WHILE the manufactured gas business remains substantial (about one-third of total gas revenue was from manufactured gas in the month of January), most of the distribution is done by electric light and power companies, somewhat as a side line to their electric business. Only in New York city and New England, where the use of natural gas has not yet penetrated, do we find stocks of "simon-pure" manufactured gas companies. However, the stocks of some other companies, controlled by holding companies in process of dissolution (such as Consolidated Electric & Gas and American Gas & Power), may come into the hands of the investing public in the next year or so.

The accompanying table includes the principal stocks currently traded in. While there has been some fear that the manufactured gas companies would suffer from wartime inflation and rising fuel prices, the New England stocks and Washington Gas Light are still well regarded by investors, judging from current price-earnings ratios and yields.

Brooklyn Union Gas has, of course, suffered from dividend irregularities and near-by bond maturities, but the recent progress with a broad refunding program has been reflected in a substantial rise in the price of the stock. Completion of this program may permit larger dividends.

A Sane Commission View on Taxes and Rates

THE following is quoted from the 1943 report of the public utilities commission of Connecticut (pages 11, 12):

> . . . In a period of total war when approximately three-fourths of the productive output of the nation is channeled into war avenues, it is inevitable that industry will experience a heavier burden of taxation. This has been the case with the utility industry as well as with manufacturing plants and mer-

MANUFACTURED GAS COMPANY STOCKS

	Where Traded	Price About	Share Earnings Latest	Share Earnings Previous	Price-Earn. Ratio	Indic. Div. Rate	Yield About	Approx. Range 1944	Approx. Range 1943
Brooklyn Union Gas..	S	20	$2.26[2]	$1.71[2]	8.9	.50	2.5%	22-14	18-9
Hartford Gas	O	36	2.26[1]	2.13[1]	15.9	2.00	5.6	..	..
Providence Gas	C	8	.53[1]	.56[1]	15.1	.50	6.3	8-7¼	8¼-7
Springfield Gas Lt. . .	O	22	1.42[1]	1.26[1]	15.6	1.30	5.9	23-19	21-12
Fall River Gas	O	25	2.08[4]	2.18[4]	12.0	1.60	6.4	..	..
Washington Gas Lt.*.	S	25	2.02[3]	2.07[3]	12.4	1.50	6.0	25-22	23-15

S—Stock Exchange. C—Curb. O—Overcounter.
* Natural gas used for enriching and reforming purposes.
[1] Twelve months ended December 31st.
[2] Twelve months ended March 31st.
[3] Twelve months ended April 30th.
[4] Twelve months ended May 31st.

cantile establishments. So rapidly has the tax mounted that it has not been offset by increased revenues during a war period.

There has been some controversy in regulatory circles as to the propriety of including war taxes as utility operating expenses. The situation is made more acute by virtue of the fact that the war tax is predicated upon capital structure, excepting where prewar earnings are used, whereas the utility is supposed to earn a fair return on the value of its property. There is no necessary connection quantitatively between capital structure and value of plant. Hence, the excess profits tax, computed on the basis of capital structure, applies to many utility corporations even though they may not have earned in excess of what has been determined to be a fair rate upon the value of their property. The impact of this tax is further complicated by virtue of the fact that the corporation is given, for tax purposes, credit for money distributed as interest on bonds and for dividends on preferred stock. Therefore, with the tax burden a function of capital structure, we may well find that two utility corporations having exactly the same rate base and operating under similar conditions sustain radically different tax burdens by virtue of the fact that one company has its investment represented by common stock and the other company has in its capital structure preferred stock and bonds. The tax therefore works inequity as between different companies representing the same amount of investment as well as a further inequity by virtue of a lack of coincidence between capital structure and rate base.

Some commissions have ruled that all taxes, no matter the caption under which paid, are legitimate operating cost. Other commissions, notably the Federal Communications Commission, have decided that only taxes at the prewar level should be included in operating cost and that any additional taxes over and above the old rates should fall properly upon stockholders as their contribution to the war effort. Still other commissions, as that in the District of Columbia, have attempted a compromise whereby they include as operating expenses taxes at the prewar level and in addition thereto some of the increases subsequently made in the tax rate. That commission, for example, in a recent case allowed taxes as an operating cost at the rate of 31 per cent of net income of the company whereas a much higher rate was paid.

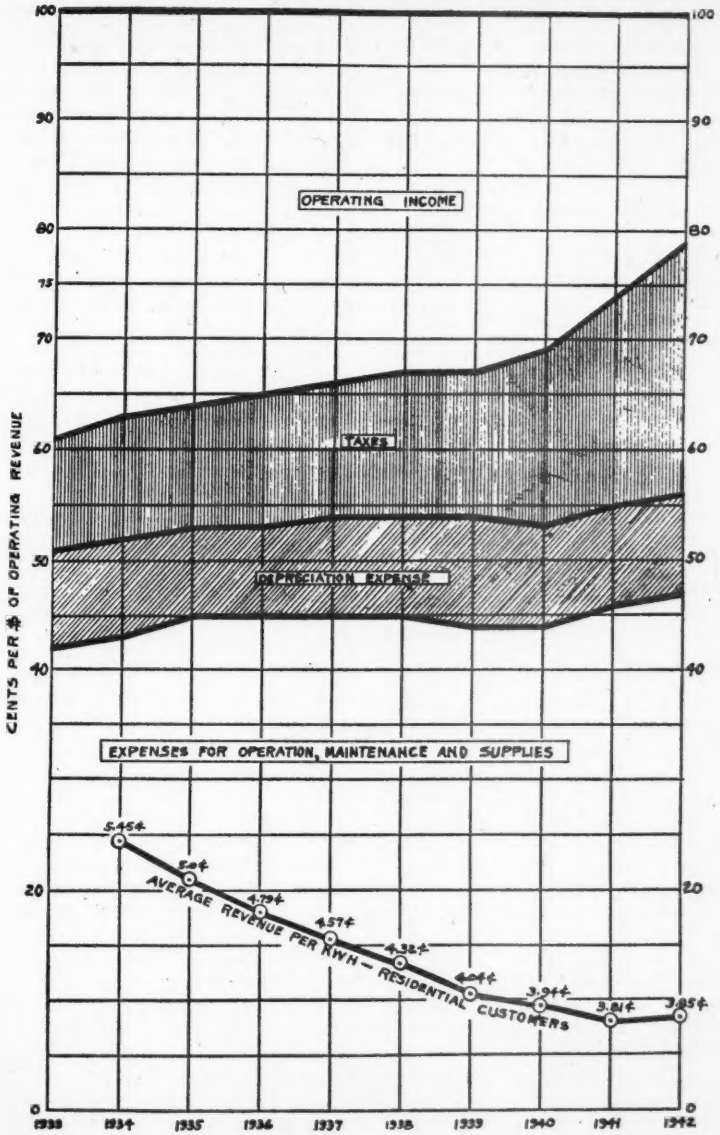
The complexities and inequities of the tax problem are beyond the jurisdiction of a regulatory commission. It has seemed to this commission that the realistic approach and the equitable solution lie in the inclusion of all taxes assessed against utility operations as operating cost. It follows from this conclusion that the rate of return of a utility corporation in a period of war should reflect inclusion of war taxes as an operating cost. In other words, what constitutes a proper rate of return varies, depending upon whether taxes have or have not been permitted as operating cost. The acid test, from the long-range view, is the need of allowing invested capital a rate of return that will insure adequate service to customers. This criterion may be ignored from a short-time point of view, but in the long run its acceptance is necessary for the protection not only of investors but also the consuming public. The acceptance of this philosophy does not mean that a utility corporation should be insulated from the burden of war and that the rate of return should be identical with what is fair and proper under normal conditions of peace.

New England Power Association

NEW ENGLAND POWER ASSOCIATION (NEPA) is an important holding company, which in March filed a merger-recapitalization plan with the SEC. Since its properties are concentrated in New England, the system apparently has no geographical problems under § 11, but the Utility Act does require corporate simplification. NEPA is controlled by International Hydro-Electric, and in turn controls four holding companies, the system setup being indicated in the table below.

	Oper. Utilities	*Misc. Cos.*	*Indirect Subs.*	*1944 Rev. (Mill.)*
New England Power Association (NEPA)	11	4	1	$17.0
Massachusetts Power & Lt. Assoc. (MPL)	2	..	..	5.0
North Boston Lighting Prop. (NOBO)	9	..	1	13.0
Rhode Island Public Service (RIPS)	1	3	2	26.0
Massachusetts Util. Assoc. (MUA)	21	..	..	13.0
	44	7	4	$74.0

CHART OF REVENUE, EXPENSES, AND INCOME—1933-1942
FOR
ALL PRIVATELY OWNED ELECTRIC UTILITIES IN CONNECTICUT



From 1943 report of the Connecticut Public Utilities Commission

While it has the smallest number of subsidiaries, RIPS is the most important subholding company, as indicated by the revenue figure. It controls Narragansett Electric Company (with gross revenues of $17,165,408), which services the greater part of Rhode Island.

Under the plan the holders of stocks of the various holding companies would receive shares of the new company as follows:

	Shares of New Company	
	$2 Pfd.	*Common*
MPL $2 pfd.	.5	1.1
$2 second pfd.	..	.05
Common	..	.02
NOBO pfd.	1.5	3.0
MUA pfd.	1.0	1.0
Common	..	.2
RIPS pfd.	1.0	..
Class A	2.0	..
NEPA 6% pfd.	1.5	3.9
$2 pfd.	.5	1.3
Common	..	1.0

WHILE most of NEPA's operating subsidiaries are conservatively capitalized on the New England pattern, with a broad common stock base, the combined senior capital of NEPA and its subholding companies produces a moderately top-heavy capital structure. The consolidated system plant account, excluding intangibles and write-ups (so far as obtainable), amounts to about $229,000,000, to which may be added $21,000,000 for Massachusetts Utilities Associates (not consolidated). It is difficult to estimate the value of nonsystem securities held, but these may be estimated roughly at $6,000,000, and system net current assets amount to about $15,000,000, making a grand total of $271,000,000. Using this figure for determining common stock equity in both the present and merged setups, we have the results shown below in millions:

	Present Setup	*Merged Company*	*% of Total*
Subsidiaries' funded debt	$94	$81	30%
Subsidiaries' preferred stocks	61	22	8
Subsidiaries' minority interest	13*	12*	5
NEPA and MUA funded debt	19	60	22
NEPA and MUA preferred stock	93	71	26
NEPA and MUA common stock	D 9	25	9
	$271	$271	100%

* It is assumed that this item is not affected by plant write-offs, except in the case of MUA where no common equity remains for the publicly held stock.

On the basis of the figures below, the book value of the new $2 preferred stock (2,594,423 shares, $27.50 par) would be about $37 a share, and of the new common (5,227,368 shares, no par) $4.76 a share. These figures differ considerably from those presented in the *"Pro Forma* Condensed Consolidated Balance Sheet Estimated As at March 1, 1944" (page 14 of letter to stockholders dated March 7th).

Due to inclusion of intangibles in the latter balance sheet, the book value of the preferred was about $79.40, and of the common $25.50. The difference between the equity of $205,000,000 (for preferred and common) in the *"Pro Forma* Balance Sheet" and the $96,000,000 shown above is substantially explained in footnotes 2 and 3 of the *"Pro Forma* Balance Sheet."

Following is the consolidated earnings and dividend record for the preferred and common stocks:

	Consolidated Share Earnings		*Dividends on 6% Preferred Stock*
	Preferred	*Common*	
1943	$6.44	$.40	$4.00
1942	7.00	.81	4.00
1941	5.72	D.12	4.50
1940	6.28	.28	6.00
1939	7.54	1.20	5.00
1938	6.40	.37	4.50
1937	8.48	1.88	6.50
1936	8.44	1.85	4.00

Dividend arrears on the 6 per cent preferred stock now amount to $12.50

and on the $2 preferred (of which there is a small amount outstanding) $4.17. The 6 per cent preferred is currently selling around 60, the $2 preferred around 20, and the common is 6 bid.

THE company's plan has met with some opposition from a committee representing 170,000 shares of Rhode Island Public Service $2 preferred stock. The committee has suggested to the SEC the possibility of liquidating RIPS. Under the proposed NEPA plan, RIPS preferred holders would exchange their shares for the same amount of new NEPA $2 preferred, which, it is claimed, would not only have a lower liquidating value, but would be junior to the $60,000,000 funded debt, whereas now it is junior only to bonds and preferred stocks of Narragansett Electric. SEC hearings have been held but no decision on the plan has as yet been announced.

Income Return from Depreciation Reserves

AN interesting article entitled "Economic Implications of Public Utility Depreciation Accounting" by Herbert B. Dorau appeared in the June issue of *The New York Certified Public Accountant.* (See also page 239 of this issue.) Mr. Dorau points out that a reserve accrued on a straight-line basis will, over a period of years, approach 45 per cent of the original cost when the property as a whole nears maturity, and this may represent some 82 per cent of the capital contributed by investors.

In effect, this amounts to the assumption that *the investment is being amortized.* Thus the Federal Power Commission ("The Financial Record of the Electric Utility Industry, 1937-42") stated "utility operating income represents the return earned on capital invested in utility plant. But the amount of operating income shown on the books is affected by the amount accrued for depreciation which provides, in effect, for the return of capital through charges made to provide for the annual consumption of capital in the business." If the utilities are thus to be put in the same class with mining companies, whose ore reserves are gradually being depleted, would it not be possible for utility stockholders to claim that a portion of their dividend income represents a return of capital and is tax exempt? (This is our own comment.)

But, as Mr. Dorau points out, the balance in the reserve does not represent funds returned or returnable to the investor—it reflects assets which have, in effect, been segregated for the benefit of consumers. It is a fallacy to assume that the reserve is deductible from plant account in fixing the rate base because it reflects the return of original capital made to investors. It is also fallacious to hold that investors have no claim on any part of the earnings resulting from the employment of the assets reflected in the depreciation reserve.

THE new philosophy of straight-line reserves put forth in some quarters seems to assume that the portion of the plant earmarked for the reserve represents "public capital" (*i. e.*, capital which benefits the consumers rather than the investors); and the return on this public capital "has undeniable priority on any and all obligations of the company if the return on it is taken in the form of lower rates," says Mr. Dorau.

Another conclusion is that investors suffer a loss to the extent that funds reflected by the depreciation reserve remain in the form of cash assets and cannot be fully and promptly reinvested in the property. However, this point does not seem quite so well taken. Cash assets, while they may yield only 2 per cent or less if invested in government bonds, nevertheless afford a dividend reserve for the protection of stockholders—so long as there is earned surplus which permits the use of the cash for disbursement to stockholders. The cash assets, while theoretically a part of the depreciation reserve, are seldom or never definitely earmarked, and accordingly remain at the disposition of the directors to use at their discretion. If a company is forced to accumulate an unusual amount of cash

(as, for example, American Telephone and Telegraph) there might be some weight to Mr. Dorau's argument.

Of course if the straight-line theory were rigidly applied over a period of years, it might result in a burdensome amount of cash. But the utilities might be much better off if they had followed a past policy of reinvesting part of their depreciation accruals in outside investments, yielding a fair return. Such investments would remain substantially outside the field of utility regulation, and the income obtained would not be subject to determination by regulatory commissions.

It is by this means that railroads like Union Pacific and Pennsylvania Railroad have been able to maintain long, unbroken dividend records despite the sharp ups and downs of their regular business, and the public regulation of their rates.

SOME commissions recognize the investor's interest in the reserve. Mr. Dorau quotes from the Wisconsin commission as follows: "Where the reserve is provided on a straight-line basis and retained by the utility, any interest earned on assets offsetting the reserve would constitute income of the utility." As a compromise, he suggests that a moderate interest return be allowed on the depreciation reserve balance—say 3 per cent—which would reflect the fact that reserve funds are not all employed, or cannot be employed with full effect at all times. The new franchise of Dallas Power & Light (obtained from the city) provides for:

> 1. Exclusion from the rate base of reserves invested in the property of the company, up to an amount that might be considered representative of the depreciation-in-fact of the company's properties.
>
> 2. Payment, at a rate comparable to that of low-risk capital, for the use of other reserve funds to the extent and for the period that they are invested in the properties of the company.
>
> 3. Investment in securities, other than those of the company, of any reserve fund not immediately required for this proper purpose, with appropriate credit or charge to depreciation reserve of any profits or losses that may result from such investments.

The corporation commission of Oklahoma in 1940 ruled that the amount in the reserve in excess of "depreciation in value" should be regarded as an *insurance reserve.*

The company could either keep this excess in liquid funds, or reinvest in the plant — in the latter event (having assumed additional risk), it could retain any excess over the income obtainable from sound marketable securities.

IN the so-called profit-sharing rate plan recently adopted by New Jersey Power & Light in coöperation with the state commission, it was pointed out that, if the utility management elects to invest the depreciation reserve in the property (instead of in low-income liquid securities), it is thereby "entitled to compensation for management of the investment and for performance of the risk-taking function . . . It is concluded that an appropriate reward for risk and responsibility taken under the circumstances of the operations of this utility is one-half of the allowable rate of return." The plan therefore recognized that, in the determination of the rate base, the depreciation reserve should be divided into two parts, one representing estimated *existing* depreciation (which should be deductible in full), and the remaining excess amount (only half of which should be deducted from plant account).

Mr. Dorau points out that this practical approach to the problem is applicable to any theoretical method of accruing the reserve, whether straight-line, compound interest, etc. In other words, it must be recognized that under theoretical methods of setting up the reserve, it is partly in the nature of an insurance fund and not wholly realized depreciation. Even if it be admitted that the fund belongs to the consumer, the utility is entitled to a management fee if the money has been reinvested in the property.

What Others Think

The Consequences of "Perfect" Regulation

DELIVERING a broadside at what he termed the "screwball economic idiocy" which has been inflicted upon the United States in the last fifteen years, Dr. H. B. Dorau of New York University revealed the technique by which reformers propose to communize the utility industry and warned the accounting profession to adjust its thinking to compensate for the economic consequences of the increasing trend toward drastic and rigid regulation.

Dr. Dorau stated his views in a paper presented sometime ago to the National Accounting Conference of the Edison Electric Institute and American Gas Association in Cleveland, Ohio. The burden of his thesis was that accountants have been caught in the middle of a regulatory trend which intends by weasel words to use accounting as a scapegoat in valuation and rate making without consideration for the fact that the bookkeeping process has no relation to economic factors. He pointed out that the investor is ignorant of the effect upon him of the new theories of valuation and rate making and that when he becomes aware of the losses he is suffering he will revolt by refusing to invest in utility enterprises, thereby weakening the structure of these enterprises and making them easy prey to public ownership advocates.

Dr. Dorau contended that while the old system of public regulation of private business was not perfect, its great merit was that it achieved a large measure of social advantage without destroying the incentive which makes possible further social gains. He continued:

> But the perfectionists were not happy. Sometimes, in some places, some people were yet able to earn an incentive return in the utility business. This imperfection must be eliminated, regulation must be made effective! That is where my crowd—the academicians—came in. They had never constructed an alarm clock but they sure could improve on those that had been constructed. They would perfect it, or ruin it—let the record read and let it be said with malice toward none that, "they really *meant* to perfect it."

DENOUNCING the attempt to attain perfection in regulation, Dr. Dorau continued:

> "Effective" regulation will be . . . self-defeating. Without at least the hope of a chance of gain, enterprise in utility industries will as surely die. The academic and bureaucratic mind, innocent of the facts of economic life, will only discover the significance of the "chance of profit" to the continuation of enterprise and the social dividends of better service at lower cost, when the mechanism which has made it possible has been destroyed. But the fellow traveler whose bible now carries the title, "Planned Economy," but whose words are still the words of Marx, is not surprised, for he planned it that way. He knew the axiom of statesmanship which the successful founders of tyranny have understood and acted upon—that great changes can best be brought about under old forms, that the way to communize a country by evolution is to socialize one industry at a time, and that the easiest way to communize one industry at a time is to make it increasingly difficult and finally impossible for a system of economic freedom and enterprise to produce socially satisfactory results. Sabotage of private ownership and enterprise in the utility industries is the practical road to Communism, much more practical than to ask the people in advance whether Socialism is the end they want.

He said the present regulatory trends and related public policies are operating steadily and rapidly to eliminate the opportunity and reward of enterprise without which private ownership will not long, in effect, be any more desirable than Socialism, and added:

> The scheme of regulation of public utilities now evolving in the United States threatens to destroy the basis for the initiative

and enterprise which made economic progress possible under government regulation. Some managements are awake to the full import of the trend but the impact is slow—now here, now there, a little more here and further encroachment there—and that is the insidious feature of the change that is being achieved, but I wonder how many accountants are aware of the ultimate import of this creeping revolution on their industry, their art, and their future.

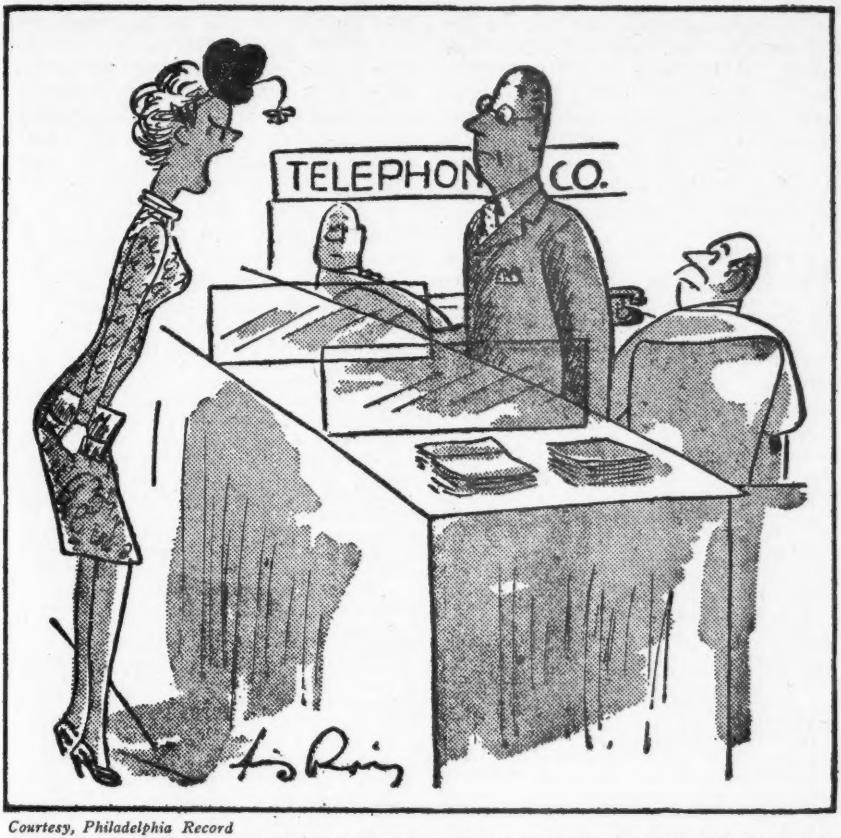
On this basis, he urged as a matter of first importance the changed place of accounting in the scheme of regulation, declaring that accounting is well on the way to becoming the most single and exclusive implement of the regulatory process. He said the plans and practices of public utility accounting, which were acceptable before regulation came to attach so much significance to accounting results, are simply no longer reliable or satisfactory. He added:

> . . . now that accounting results are assumed to have economic meaning and significance, it certainly behooves the accountants to give them that meaning and significance, so far as they may be permitted by their new masters. That means that if the dollars of utility plant are assumed to reflect the cost of utility plant, the accountant must see to it that all the cost is recognized and included. Some of you have already seen your companies' disallowed actual costs, simply because they had not at the time been accounted for.
>
> Not only will the old established habits and norms of accounting procedure have to be subjected to scrutiny but the references to so-called principles of accounting outside the utility field must be discontinued. It should be apparent that the results of accounting have now a totally different significance for public utilities than for nonutilities. The way in which an industrial concern accounts has little effect on the return which it earns outside of accommodation to the tax laws; in the utility industry it has every significance. It is now time to recognize that the conventions of public utility accounting are not to be tested by reference to unregulated industry accounting. It is not too late to develop a public utility accounting which finds its sanctions in the unique character and basis of utility enterprise. Some body such as yours should make that its function or coöperate in having it performed.

COMMENTING upon the tendency toward the convention of conservatism in general accounting, Dr. Dorau dismissed such a plan as being invalid from the beginning but said that now more than ever it has no application whatsoever in utility accounting. This is because the present trend in regulation "is to take advantage of any utility which sees fit to follow the convention of conservatism." This is particularly evident in the retroactive application of the cost standard as now being practiced by many commissions, he said, continuing:

> . . . I have no objection to the cost standard as a basis of public utility regulation. My objection is to the fact that regulation does not recognize and respect the cost that is functionally significant, the cost which has some economic meaning and significance, and to the fact that public utility management seems so often to have only the vaguest conception of what cost actually means. The accountants serving these industries have been particularly derelict, if not in fact obtuse, in failing to understand that the cost is something more than the adding-machine total of paid vouchers. The cost which is economically significant and which disciplines economic behavior toward that desirable end of giving society as a whole the most for the least, is *present cost*. All past costs are as dead as dodoes as far as having any future economic significance in a system of free economic choice. Cost means the sacrifice at which a supply of goods can be produced. This cost standard is implicit in the fundamental and well-established American principles of public utility regulation. This is the economic meaning of the "cost of the service." Largely because the economic cost standard is so well established as a basis of public utility regulation, it has proved expedient to cry "cost" yet not to mean cost. Cost became a shibboleth, but in word only. Cost is not determined by the manner and method of accounting; cost is an independent fact. It exists independently of accounting and does not vary with changes in accounting fads and styles. Whereas accounting should attempt as best it can to reflect experienced cost, yet the reverse is nevertheless true; namely, that the cost is determined by the manner of its accounting. Contemporary tactics in attempting to obtain expedient regulatory results seem clearly ostrich-like in character. Costs cannot be reduced by just refusing to see them. If it were as simple as that why should we stop with small, or even large-time, chiseling? Why not reduce costs to total nonexistence by not accounting for any of them and shortly the millennium would be at hand?

Dr. Dorau admitted that his suggestions were coming a little late, pointing out that "your masters are now telling



Courtesy, Philadelphia Record

"CERTAINLY IT'S ESSENTIAL! I WANT A TELEPHONE TO MAKE DATES AND GET MARRIED AND HAVE CHILDREN WITH!"

you what costs you can record, even what actual experienced past costs you may now record." But he predicted that as to the future all experienced cost will, to the extent permitted, be recorded in the books of accounting records, including capitalization of all overhead costs incurred in connection with further development of property and the capitalization of interest during construction.

He noted certain basic trends toward self-destruction of a workable system of private enterprise. They appear in the form of (1) depressed rate of return seeking all too often the lowest possible rate of return which the court will approve as nonconfiscatory, rather than the rate of return in the functional economic sense of the prospective yield to capital at which the funds employed could now be induced to engage themselves in these industries; (2) the frequency of rate reductions which destroy one of the most significant inducements to real enterprise under the older system of regulation, which gave men some reason to believe that for a period of time at least they would be allowed to enjoy some of the fruits of their extra effort; (3) the lack of inducement to enterprise, efficiency, and economy in general under the scheme of regulation so feelingly referred to as

"effective regulation"; and (4) the frequent and ever more insistent demand on the part of regulatory authorities that the prudent investment of the past, necessarily and unavoidably made to create systems of economic size and integrate markets that are more economical to serve, be confiscated under an arbitrary definition of original cost.

WITH respect to the depreciation reserve, Dr. Dorau said the prevailing attitude would be defined as the disposition to deduct "accounted-for depreciation" or theoretically accrued depreciation, whichever is larger, and added that depreciation which historically in rate regulation has been conceived as evidence of the fair value of the property used and useful is not "accounted-for depreciation." He said the use of a rate base determined by deducting "accounted-for depreciation" from "accounted-for original cost" cannot, at politically expedient rates of return, yield a fair return or make the utility industries attractive to future investors. He said:

> Many a utility company would be better off to sell its properties outright to public agencies. In such sales the investor at least gets nearer to the present worth than he does by selling them in this piecemeal fashion on a theoretically depreciated-accounted-for-original cost rate base. It should be obvious to all skilled in at least elementary arithmetic that any system of regulation that presumes to deduct amortized-accounted-for-original cost in the determination of a rate base will result in a yield on the actual investment less in amount than any conceivably fair return.
>
> Not only with respect to the basis of rates and treatment of depreciation in the determination of a rate base, but also with respect to the rate of return, is it evident that current trends in public utility regulation are operating to allow only the lowest possible return to the investor. It used to be said in support of a rigid rate base such as original cost that the economic necessities and investor equities involved in the use of such a rate base could be rectified by appropriately higher rates of return. I have seen no evidence of any such compensatory practices in the rates of return allowed in recent years.

Attacking the contemporary system of regulation for including retroactive provisions to accelerate reserves to depreciation, Dr. Dorau said that regulatory bodies were acting apparently without regard for the fact that the company may not in the past have earned a fair return after such provision for depreciation and that the customers in fact did not pay rates which would have permitted such provision for depreciation. Continuing, he said:

> Another significant feature of the contemporary trend in public utility regulation is the disposition to eliminate so-called intangible assets from books of account and, *pari passu*, from consideration for rate base determination purposes. . . . Intangible assets are not worthy of consideration or inclusion because intangible assets are construed as synonymous with good will. Good will in industrial accounting is subject to early reduction and short-term elimination; therefore, public utility balance sheets and public utility rate bases do not properly reflect intangible property, *quad erat demonstrandum*. This logic would be so beautiful if any of the assumptions on which it is based were true. Unfortunately, few public utility accountants indeed have avoided being "taken in" on one or more of these fast transpositions of the meaning of words. . . . All of these trends are not intended to alarm you unduly; in fact, the less alarmed you are about them the easier it will be for their proponents to bring them to an early satisfactory consummation. The soporific which is accomplishing this purpose remarkably well is the argument that "after all, it is only accounting and accounting does not hurt anyone." I am certain the contrary will be true. The figures entered on the books of accounts of public utilities will be the strongest presumption in favor of their acceptance as economic facts. Moreover, the burden to disprove will rest on the utility company.

Dr. Dorau summarized the economic meaning of these regulatory trends in part as follows:

> . . . the investor has already experienced and will continue to experience substantial losses due to regulatory manipulation of the basis of public utility earnings. The investor losses due to regulatory manipulation will exceed substantially all the alleged losses due to manipulation or inappropriate practices of private managers. Original cost means a rigid rate base. A rigid rate base means a price-frozen industry operating in a fluctuating economy. The result can only be "under" or "overpricing" of public utility services, but since no commission has the power to

enforce economic "overpricing," no such compensations need be expected to accrue. The social ethics of retroactive rate making is second in importance only to its effect on the willingness of investors to invest. The changes in the rules of the commissions have been rapid, radical, and retroactive. To all of these the informed investor is allergic. The bold-faced confiscation of bona fide integration costs, in the name of elimination of intangible elements, constitutes a liquidation of bona fide past investment of such proportions as to destroy the confidence of individuals in the integrity of regulation as a social process. It stands, furthermore, as a warning to those who would facilitate the integration of the utility industries into more economic units, not to expect any compensation for the assumption of risks or the rendition of services, to, in fact, beware of expending a single dollar for the creation of economic advantage which after the fact is so blithely ordered to be written off from the books of account and intended to be disregarded thereafter for rate-making purposes.

Thus, Dr. Dorau concluded, the increasing significance of accounting in this new scheme of regulation is obvious and the very manner and method of accounting as well as decisions of policy may have highly significant regulatory consequences, as a protection for the investor and for private enterprise itself.

Irrigationist-navigationist Battle Rages

Two recent developments have probably sealed the doom of the Rivers and Harbors Bill (HR 3961) and the Flood Control Bill (HR 4485)—for this session of Congress, at least. With no legislation of this nature in more than six years, it is likely that these bills may not be enacted in even the next session, unless drastic concessions are made by either the irrigationists or the navigationists.

The developments are (1) party planks in both the Democratic and Republican platforms favoring irrigation over navigation, and (2) a bitter controversy between the two factions at the special meeting of the National Rivers and Harbors Congress held in New Orleans July 27th and 28th. The navigation forces were obviously in control of the sessions and were victorious.

Here are the platform pledges:

The Democrats: "We endorse the President's statement recognizing the importance of the use of water in arid land states for domestic and irrigation purposes."

The Republicans: "We favor . . . recognition and full protection of the rights and interests of [the arid and semiarid] states in the use and control of water for present and future irrigation and other beneficial consumptive uses."

Both bills already have been passed by the House along the lines advocated by the Army Engineers to the benefit of flood control and navigation. In the Senate, Senator O'Mahoney has introduced an amendment to the Rivers and Harbors Bill on behalf of himself and a group of western Senators, which would declare it to be the "policy of the Congress to recognize the interests and rights of the states in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control." The amendment also would "preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the nation's rivers and . . . limit the utilization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with the appropriate and economic use of the waters of such rivers by other users."

The amendment further provides that works authorized by the bill shall not be undertaken until an investigation and a report thereon have been made and approved by Congress in any case where the governor of any state in which the works or any part thereof are located or in which arise any of the waters which are required therefor files a written op-

position thereto with the Secretary of War within three months after the date of the act. The Secretary of War would be directed to coöperate with the states in making an investigation for the coördinated use of water.

In the case of projects that might require the use of waters arising west of the 97th meridian, the Secretary of War would be required to coöperate with the Secretary of Interior, as well as the states, in any investigations. Nearly the whole of the Dakotas and Nebraska, two-thirds of Kansas, half of Oklahoma, and all but a small part of Texas are west of the 97th meridian. Interior as well as the governors of the states in this vast western area thus would have tremendous powers under the amendment in determining the disposition of the waters in the many streams in the drainage system which forms the Missouri valley. It is expected that a similar amendment will be offered in the Senate to the Flood Control Bill.

THE Rivers and Harbors Congress ended with a definite decision to oppose the O'Mahoney amendment, despite threat of a filibuster in the Senate against the two bills. That a filibuster may develop is held not to be unlikely, in view of the major party platform pledges and the strength of the irrigationists in the senior body. The navigationist victory came when the Rivers and Harbors Congress turned down a substitute to the report of the resolutions committee. The substitute would have endorsed disposition of the waters of the Missouri river to the benefit of irrigation and would be in line with the program proposed by Interior's Reclamation Bureau as against that submitted by the Army Engineers. The power division of Interior also favors the O'Mahoney amendment because of the greater prospect of developing electric power dams if navigation is to be sidetracked.

Delegates from the Dakotas and Colorado, supporting the substitute, argued that irrigation should have first priority in the use of Missouri valley water, ahead of navigation and flood control. This would be effected by giving the valley states primary control of the water within their boundaries, with the surplus going under control of the Federal government. The majority of the Rivers and Harbors Congress, however, adhered to the plan in the bills as now written, for the water to be impounded and handled jointly for various uses.

When Ben Saunders of Denver, Colorado, who offered the proposed floor amendment to the resolutions committee report, said that 52 votes in the Senate are pledged to the adoption of the O'Mahoney amendment in Congress, Senator John H. Overton of Louisiana remarked: "I've never heard that."

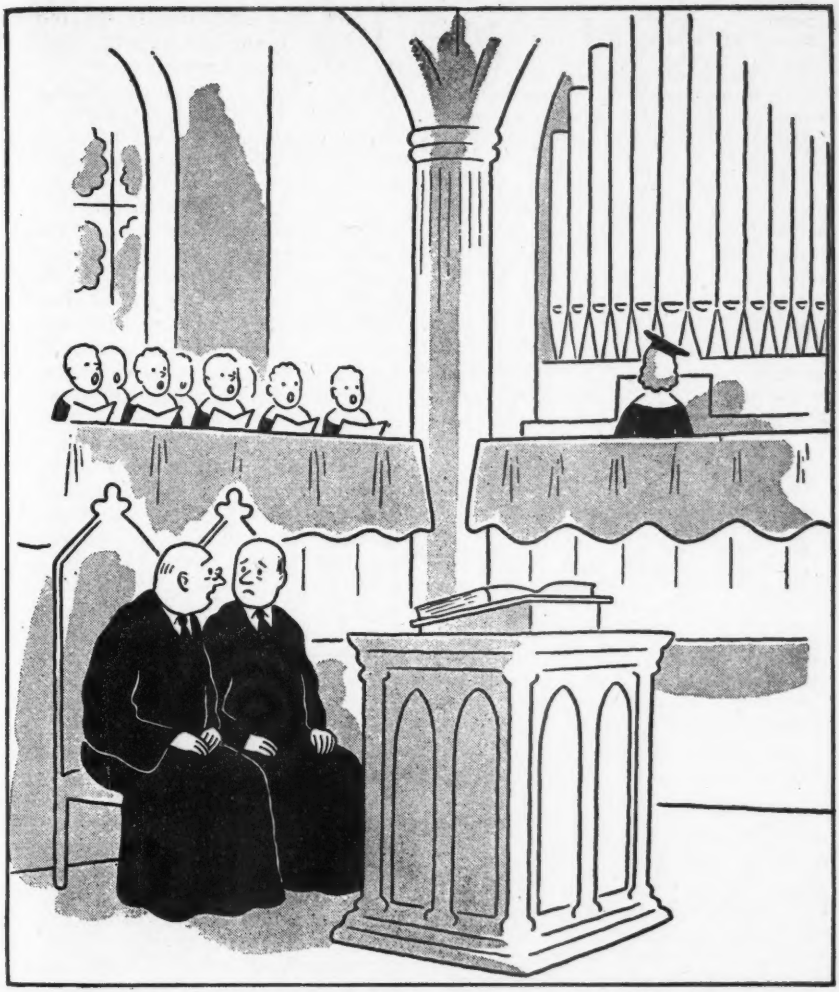
Senator Overton brought loud applause from the gathering when in opposing the proposed floor amendment he declared:

> I regret the threat of a filibuster but I will fight day after day before I will permit the governor of any state to override the Congress and the [Army] Engineers on the propriety of such projects.

THE O'Mahoney amendment, according to Overton and other speakers, would give the governor of any state the right to block any project in any other state by objecting to it, thereby necessitating new surveys and hearings, and new action by Congress.

After the floor fight, the meeting voted to uphold the report of the resolutions committee as to the Missouri valley controversy. The resolutions committee report said that it opposed the principles involved in the O'Mahoney amendment on the ground that it is of doubtful constitutionality and would give rise to fruitless litigation and consequent serious delay of important construction work and would give the states a power of veto over legislation enacted by the Congress and approved by the President. The report continued:

> We commend Senator John H. Overton of Louisiana for the impartial and statesmanlike manner in which he conducted the Senate hearings on the pending Rivers and Harbors and Flood Control bills, which have been favorably reported by the Senate Commerce Committee and should be enacted in the form reported without further delay.



"I ORDERED THE GAS AND ELECTRIC COMPANY TO TURN OFF THE AIR CONDITIONING. MY TEXT IS 'HELL AND DAMNATION'"

ON the subject of hydroelectric power, the Rivers and Harbors Congress adopted a report of the resolutions committee as follows:

The existing authority for navigation and flood control projects and that contained in the pending Rivers and Harbors and Flood Control bills provides for a number of multiple-purpose reservoir projects where large blocks of incidental hydroelectric power will be provided. This power should be secondary to the primary functions of the projects. At the present time there is no general law governing the sale of the power that will be generated at the dams under the control of the War Department. The sale of such incidental hydroelectric power should be made at the point of production, without special privilege or discrimination, so as to provide for the complete coördina-

tion of such power and energy with other power developments, both private and public, in the area contiguous with such projects. This government power should be sold with the stipulation that any and all savings realized by the purchasers will be passed on, under government regulation, to the consuming public.

The Congress also went on record as opposed, in effect, to the creation of a Missouri Valley Authority when it placed itself on record as being in full accord with the principles set forth in the McClellan Bill (S 1519) and in the Maybank Bill (S 1876), which have been incorporated into § 1 of the Flood Control Bill, as reported by the Senate Committee on Commerce. The Flood Control Bill incorporates in § 1 these principles:

> It is the purpose of this act to establish a definite policy of making use of existing Federal agencies for the construction, operation, and maintenance of all public improvements in connection with navigation, flood control, and allied activities; to insure coördinated operation of all Federal projects therein for the improvement of navigation and alleviation of flood conditions; to provide for realization of other benefits to be derived from such projects; to facilitate preparations and planning for postwar construction by the Federal government in the interest of employment; and to secure efficient executive management under the direction and supervision of the permanent executive agencies already established by act of Congress.

The Congress held that such a policy will assure "the American way of securing public improvement, will prevent the absorption of power by an individual or by a clique, will discourage the creation of authorities that can be operated by directors without any outside check or supervision, and will guarantee the ultimate power in the hands of the people." It was contended that the well-established functions and recognized coöperation of the several Federal agencies concerned with development of water resources makes unnecessary creation of new authorities such as TVA.

The Congress also went on record as being vigorously opposed to any move to transfer from Army Engineers any of their functions in administering the waterway systems of the nation.

THE floor substitute to the resolutions committee report opposing the O'Mahoney amendment was introduced by Saunders. It proposed in substance that the Rivers and Harbors Congress urge adoption of the Flood Control and Rivers and Harbors bills with such amendments as would remove the provisions "which are inimical" to the sovereign rights of the states to formulate projects for the use of their own water, thus providing recognition and protection for the preservation of limited water supplies in the arid and semiarid states.

Mr. Saunders declared this would not necessarily be inconsistent with the position of the majority, and that there was no intention to dictate an exact wording for an amendment to the bills pending in the Senate. Such an amendment should be drafted as will insure the passage of these bills, since there is grave doubt, he declared, that they can be passed without an amendment that would be fair to all concerned, so that no section of the West would be left out. Adoption of his floor amendment, he added, would approve the principle that an agreement can be reached on legislative matters.

Ennis W. Simons, vice president of the North Dakota Water Conservation Commission, said that in the House the Whittington amendment designed to settle the controversy did not protect the interests of the West, "but merely insulted our intelligence . . ."

"The battle will go on and on if it is not settled here," he declared. "You cannot eventually take away the rights of the West. In the decade, 1930-40, the government spent $350,000,000 for relief in North Dakota. In the two years, 1934-36, the grass didn't even grow. We must have water to live." He added:

> Who shall get the surplus water of the Missouri basin? The Engineers say there is plenty for both irrigation and navigation, and we hope they are right, but from our experience we want to be sure. There is an alternative means of transportation to river navigation, but there is no alternative for water for life, where we are concerned. The issue here is whether the states through which the water passes shall have the first call on it or you shall have the priority.

Senator Overton rejoined that the Senate Commerce Committee had conducted patient and exhaustive hearings. There was no attempt to deprive the arid states of the water they need but "on the contrary I offered a compromise that would have taken care of the situation, which they did not accept."

THE chief objection to the proposed O'Mahoney amendment to the bills in Congress, he said, is that it places in the hands of the state governors the veto power over any project. On the objection of a governor, what Congress has done becomes wholly ineffective, and the whole routine of hearing, surveys, and congressional action must be gone through again, he declared, adding:

> I offered a compromise on the Missouri basin project. Because the lower valley suffers periodically from disastrous floods it provided for the construction of flood-control dams on the main river below Fort Peck [Montana], with any surplus water going to irrigation. It gave you the Fort Peck dam for irrigation, this dam now being primarily for navigation, and it gave you the tributaries for irrigation. The whole program you proposed reflects a grave charge against the United States Engineers, who pay no attention to political considerations. It is the greatest engineering body in the history of the world, and neither the Pick plan [by the Army Engineers] nor any other under its auspices will do any damage to the arid and semiarid regions.

Congressman Francis Case of South Dakota commented that the Overton compromise "offers definite possibilities" since the states now have no right in Federal law to their own water. The suggestion that water above the Fort Peck dam and on the tributaries be set aside primarily for irrigation gives the arid and semiarid regions more than they have today, he asserted.

The Rivers and Harbors Congress received a report from Major General Eugene Reybold, Chief of Engineers, that there was a potential backlog of $4,600,000,000 in Federal improvements in the interest of navigation, flood control, and other water uses. General Reybold said there would be no delays in preparation of plans and specifications and that "when conditions of man power and materials again permit, these projects can be placed under way . . . as rapidly as Congress may direct."

Major General Max Tyler, president of the Mississippi River Commission, warned that the fight to maintain coastwise and inland water transportation in the past was a mere skirmish compared to the battle ahead." He said the opponents of coastwise and inland water transportation oppose the adoption of all new projects and the betterment of existing ones, adding:

> They skillfully use all their arguments against the value of water transport to the general public and some new ones. Their purpose is to indoctrinate the public with the idea that in general publicly financed railroads and pipe lines can do everything that waterways can do quicker, better, and cheaper.

Senator Hugh Butler of Nebraska, member of the irrigation and reclamation committee, said the day has long since passed when the policy of developing one part of the country at the expense of another can be tolerated.

AT a meeting of the new board of directors immediately after the close of the session, the following officers were elected: Congressman Dewey Short, Missouri, chairman of the board; Senator John L. McClellan, Arkansas, president; Frank R. Reid, Illinois, president *pro tem;* William H. Webb, Washington, D. C., executive vice president; Fred D. Beneke, Memphis, secretary-treasurer; and Senator Overton and Congressmen Will M. Whittington (Mississippi), Hugh Peterson (Georgia), and Charles R. Clason (Massachusetts), national vice presidents.

New members of the board are: 2-year term — William G. Zetzmann (Louisiana), Alfred Elliott (California), Al Hansen (Minnesota), Barak T. Mattingly (Missouri), Sid Simpson (Illinois), Robert B. Ennis (Maryland), and Senator McClellan; 3-year term— H. H. Buckman (Florida), William J. Driver (Arkansas), John B. Gage (Missouri), Walter C. Robb (Minnesota), Fred Norman (Washington), and Mr. Webb.

The March of Events

Tax Savings Proposal

A RULE providing for uniform accounting procedure in the treatment of tax savings resulting from accelerated amortization of war plants and other installations in the public utility industry has been recommended to the Securities and Exchange Commission by its public utilities division, it was disclosed recently.

Under the proposed rule, tax savings from the accelerated amortization of war facilities would be placed in a special surplus reserve, from which they could be transferred to a depreciation reserve. At the conclusion of the 5-year period granted for the amortization of such facilities, the savings would be returned to earned surplus in regular monthly instalments over the remaining estimated life of the facility.

All companies holding a certificate of necessity for accelerated amortization under the internal revenue code and not subject to any other Federal or state law governing the treatment of tax savings would use the uniform method if the rule were adopted.

Utility Curbs to Be Simplified

A REVISION of WPB's utility priority Order U-1 is being proposed to utility industry committees, it was reported recently. Letters from the Office of War Utilities have gone out to the utility companies asking their reaction to suggested changes. It would take a few weeks before replies could be analyzed.

One proposal is to change the order so as to authorize extension of electric, gas, water, and steam-heating service beyond the present limits on a blanket basis. This would eliminate OWU paper work. These extensions now are being approved by OWU upon application so that, in fact, there will be little, if any, actual increase in the use of critical materials.

For example, electric utilities are permitted to make secondary extension to any domestic customer who requests it, if the extension is not greater than 500 feet. Many applications to OWU for extension of 600 feet to 1,000 feet are being approved. The proposal is to increase the limit to 1,000 feet. Similar changes would affect other utilities.

Arkansas

AP&L Order Completed

THE state utilities commission recently completed its 63-page order directing the Arkansas Power & Light Company to submit a rate schedule that would reduce its revenues $975,000 per year and fix its electric rate base at $47,996,290.

The commission announced the order last June, following hearings held between December and May 10th. The order, signed July 18th, represented weeks of staff and legal work, it was said.

Commissioner Joseph Morrison issued a separate opinion from that of Chairman Marvin Hathcoat and Commissioner A. B. Hill. He concurred with findings of fact and the directive for a rate reduction, but expressed views on the "original cost" concept, an important element in the hearing which the commission rejected in arriving at a rate base.

Mr. Morrison said the original cost theory, which measures value by cost of property to the first person devoting it to public service, represents an "abdication of discretionary powers of the regulatory body to some bookkeeper who made entries years ago," and that it makes "accounting the master of regulation."

The original cost concept advocated by the staff of the Federal Power Commission and some state commissions "is at absolute variance with our American economy, which is based upon the individual receiving the fruits of his own labor and enterprise," he said.

"Original cost undertakes to eliminate arm's-length profits," he continued. "It is not only opposed to our economy but it is fundamentally unsound. It must be abandoned in the utility field as a formula or it must be adopted in other fields of business, because it is as true in our economy as elsewhere that 'a house divided against itself cannot stand.'"

Would Acquire Waterworks

THE Helena city council voted last month to buy the Helena water system and to issue approximately $360,000 in bonds to finance the purchase. The motion was adopted

at the conclusion of a public hearing.

The Arkansas Utilities Company, owner of the property, has refused to sell at a price set by engineers who made an appraisal for the city, but proposed to make certain concessions such as free fire-plug service and payment of expenses incurred by the city since it set out to purchase the properties, provided the city would drop its plans to force sale of the water system.

California

May Join Power Pool

A PROPOSED charter amendment by which the Los Angeles water and power department would be allowed to become a part of a huge Pacific coast power pool designed to meet war conditions was tentatively approved last month by the city council.

The power pool authorization must now be passed in the form of a city ordinance and later approved by the voters at the next municipal election before it will become effective, it was said.

The plan, approved by the war power board, contemplates all West coast private and public power plants pooling their resources, the power to be used where it is most needed at any given time.

Other proposed charter amendments affecting the water and power department which were tentatively approved by the council included one to allow the department to invest its surplus funds to buy up its own bonds.

Utility Tax Hearings Begin

INVOLVING an estimated $100,000,000 a year in Federal war taxes applying to 130 California public utilities, hearings were opened late last month by the state railroad commission on an order for Southern Counties Gas Company to show cause why excess profits taxes should not be disallowed from operating expenses.

Motions for continuance of the case until an August 18th general hearing in Los Angeles were denied by Presiding Commissioner F. R. Havenner, who explained the commission did not intend to issue an interim rate order until after conclusion of the general inquiry.

Commission President Richard Sachse contended the utilities are not paying excess profit taxes out of profits, but are charging them off as operating expenses and thus are escaping the payment of war taxes in whole or in part. Spokesmen for the utilities took the view that the commission's proposal would in part circumvent the government's war financing program and that no real saving would be offered to the consumer.

Because of the form of present tax laws, war taxes do not affect all corporations equally and a disastrous injustice would be done some of the utilities, counsel for the companies said.

The commission's action directed Southern Counties Gas Company to show cause why an order should not be issued requiring the company to establish interim rates corresponding to a gross revenue reduction that would result in the elimination of Federal war taxes from operating expenses.

In seeking a continuance, 23 utilities joined as intervenors in a petition to postpone the hearing on grounds that conclusions reached in the case of the one company might prejudice the fate of the others.

Would Request Rate Cuts

THE Los Angeles city council last month unanimously adopted a resolution introduced by Councilman Delamere F. McCloskey requesting that the city attorney ask the state railroad commission to make an immediate rate survey of all public utility concerns for the purpose of obtaining reduced rates.

The resolution pointed out that motorbus and street railways had already voluntarily made some rate concessions, in view of greatly increased profits and reduced service, and that "a similar condition obtains so far as the other private utility corporations are concerned, notably the Southern California Telephone and the Southern California Gas companies."

To Appeal Rate Cut Rule

THE long legal battle over an order reducing Market Street Railway fares to 6 cents was on its way to the United States Supreme Court on July 27th after the company was denied a rehearing on a state supreme court ruling upholding validity of the rate cut.

The state tribunal unanimously denied the petition for a rehearing, and Cyril Appel, general counsel for the company, announced steps would be taken immediately to carry the case to the highest tribunal under a Federal statute covering rate cases.

Appel said the new appeal would be taken on the same grounds used in the state court, that the company "was denied due process of law by a failure of notice that it was being charged with the maintenance of unreasonable rates," and that it was not given an opportunity to present all of its evidence.

District of Columbia

Commission Member Sworn in

JAMES FRANCIS REILLY was sworn in on July 24th as a member of the District of Columbia Public Utilities Commission, succeeding Gregory Hankin, whose term expired June 30th.

Mr. Reilly, former assistant corporation counsel, resigned as executive assistant to the chairman of the Civil Aeronautics Board to take his new position.

A resident of Washington since 1928, the new member of the commission served as assistant corporation counsel from July, 1938, to March, 1940, when he went to the CAB as trial examiner.

Chairman Flanagan, who said the commission was jealous of its reputation and its organization, said he believed the addition of Mr. Reilly would be a noteworthy one.

Electric Rates Slashed

IN the most drastic electric rate reduction since inauguration of the sliding scale in 1925, the District of Columbia Public Utilities Commission last month ordered a cut of $1,037,189 for this year and reduced the Potomac Electric Power Company's rate of return from 6 per cent to 5.5 per cent.

The company was directed to file new rate schedules within thirty days to effect this reduction, which will be retroactive to March 1st.

Making substantial changes in the present sliding-scale arrangement with PEPCO, the commission ordered a change from the present undepreciated rate base of approximately $105,000,000 to a depreciated one of $80,771,719.04.

If the terms of the sliding scale had not been modified by the commission, this year's reduction in rates would have amounted to only $390,574, according to figures presented during the hearings by V. A. McElfresh, chief accountant.

In reaching its figure for the depreciated rate base, the commission used the figure of $17,844,120.48 for depreciation; eliminated $5,581,714, which represented the amount in the present rate base in excess of the original cost of property, and cut out cash working capital amounting to more than $1,000,000.

In setting the rate of return, the commission said the reduction of 0.5 per cent was predicated largely upon studies of the cost of capital presented during the rate hearings, which began February 28th.

Depreciation will be calculated at the rate of 2.7 per cent a year of the cost of depreciable property. This method, the commission pointed out, will eliminate the present controversial arrangement which credited consumers with 4 per cent interest on depreciation allowances.

The largest previous yearly cut in rates under the sliding scale was in 1931, when rates were reduced by $861,023.

The commission's order said that the sliding-scale principle of annual rate adjustment should be continued, but with substantial modifications. During the recent hearings, Alfred G. Neal, PEPCO president, stated that if the rates of return were materially reduced he would strongly urge the board of directors to withdraw from the sliding scale.

To Reconsider Record

THIS year's rate hearings of the Washington Gas Light Company will be combined with a reconsideration of the record in last year's case because the reduction of more than $132,000 ordered by the public utilities commission recently was set aside by district court, Chairman James H. Flanagan of the commission announced on July 27th.

The hearing will begin on August 18th. Reconsideration of the 1943 case will involve the question of the rate of return and disposition of excess earnings, if any.

In the commission decision set aside by the court, the commission not only had lowered rates, but reduced the rate of return from 6.5 per cent to 5.75 per cent. Chairman Flanagan at the time hailed the decision as "unique in that it includes in its consideration of cost of capital the allowable return on common stock equity."

OPA Denied Part in Hearings

THE District of Columbia Public Utilities Commission recently denied the petition of the Director of Economic Stabilization and the Office of Price Administration for the right to intervene in rate and valuation hearings for the Capital Transit Company slated for later this year.

In March, a petition of Fred M. Vinson, stabilization director, filed by Price Administrator Chester Bowles, asked that "the commission, after hearing, issue a temporary or immediate order reducing the rates of the company" and that the Federal groups be allowed to intervene.

The commission decision stated that "inasmuch as there has been no request for any increase in rates and none is contemplated" the petition was denied. The implication of the decision was that intervention would have been granted only if an increase had been requested or was contemplated, since anti-inflationary measures require notice to the Federal government of any projected increase in rates.

In its plea for intervention, the Federal agencies contended that "reduction of exces-

sive utility rates is an essential and integral part of the national policy of economic stabilization" in the program instituted by the President.

In June, 1943, the commission ordered an investigation into the "fair value" of the property of the transit company, the proper annual charge for depreciation, a fair rate of return, and "reasonable, just, and nondiscriminatory rates." On January 11, 1943, the CIO filed a petition seeking 4 tokens for 30 cents instead of 3 for 25 cents, and weekly passes for $1 instead of $1.25. The CIO and other labor groups filed a petition last January demanding an immediate hearing for reduction of rates.

The commission denied this on the ground that "no useful purpose would be served by calling a formal hearing pending completion of the investigation now in process." The CIO then filed a petition for reconsideration.

Illinois

Utility Merger Approved

MERGER of the Iowa Union Electric Company into the Union Electric Company of Illinois was approved last month by the state commerce commission.

The merger was the final step by which substantially all of the property of the Mississippi River Power Company has been taken over by the Iowa Union Electric Company which now is merging with the Union Electric Company of Illinois. Virtually all of the common stock of these three companies is owned by the Union Electric Company of Missouri.

The Union Electric Company of Illinois sells electric energy in East St. Louis and Alton and adjacent territory. The Iowa Union Electric Company sells power in Keokuk and Fort Madison, Iowa, and Dallas City, Illinois, and adjacent territory.

In the order recently issued the Union Electric Company of Illinois was authorized to issue $22,140,000 of its common stock, it was reported.

Kentucky

Utility to Lower Rates

THE Kentucky-West Virginia Power Company on July 27th proposed to lower rural electric rates $18,500 a year as it sought permission from the state public service commission to construct 1,186 miles of new rural lines in 16 mountain counties of east Kentucky. Four east Kentucky co-ops of the Rural Electrification Administration opposed the extension on grounds they have a right to the territory for expansion of their own facilities. The commission heard the private utility's case in chief before it adjourned to the following day to hear testimony from the co-operatives.

R. E. Hodges, Ashland, general manager, also revealed his utility is considering another reduction in rural rates two years hence, and that it is prepared to liberalize its present rule requiring a farmer to pay costs of his own lead-in line in excess of 200 feet from the center of the highway along which the main line runs.

Harry C. Lamberton, St. Louis, associate counsel for REA, led the cross-examination of witnesses. Lamberton declared at a Louisville meeting of REA executives that the case at issue affects every coöperative in Kentucky, and will threaten their postwar plans if the private utility gets the decision.

REA counsel intimated in cross-examination of Hodges and G. S. Dunn, Ashland, commercial manager, that the coöperatives already have prospected much of the territory in issue, doing work such as taking applications, membership fees, and easement of rights of way. Some of the proposed Kentucky-West Virginia extensions, they indicated, would parallel existing REA lines, while others would cut through the heart of highly productive territory vital to REA operations.

Michigan

New Party Hits Monopoly

A PLATFORM calling for extension of public ownership of utilities and for a liberal application of "economic democracy" was placed before delegates to the first constitutional convention of the Michigan Commonwealth Federation, new political party, which met at Lansing last month.

Modeled upon the socialistic objectives of the coöperative Commonwealth Federation of Canada, the platform was based on a declaration of principles which aroused much debate among Detroit delegates.

In its declaration of principles, the party identified itself as a federation of independent groups of voters whose purpose is "to establish a government of the people, by the people, and for the people in the commonwealth and in the nation."

In addition to urging extension of public ownership of utilities, which the federation said had been widely accepted by American communities, the statement of principles proposed that financial and monetary functions become subject to "democratic planning." It declared that concentrated private control had aggravated the drastic fluctuations in the economic order.

OPA Urges Rate Cut

FOLLOWING brief arguments by attorneys and rebuttal testimony by the city of Detroit, the Detroit Edison Company rate case again will be placed before the state public service commission for final adjudication.

Richard A. Sullivan, Detroit public utility rate analyst, contended that the evidence showed a $10,000,000 rate cut this year would leave the company with all taxes paid and $9,700,000 to divide among its stockholders. Paul W. McQuillen, Edison attorney, insisted that a city excise tax ordinance applying to the gross revenues of public utilities precludes any rate cut.

Even if the ordinance should be held invalid in court, he contended, Edison now earns less than a fair return on its investment.

The rate case began in 1942, was dismissed by the commission, remanded for further study by the state supreme court, and has been in progress periodically for several weeks.

Sharp differences between James H. Lee, assistant city corporation counsel, and McQuillen have marked the hearing. Lee has emphasized that Edison could avoid Federal excess profit taxes by effecting large rate reductions. McQuillen has contended that the taxes should be paid to "help the war effort."

Commissioner Richard H. Barkell reopened this controversy while Harry R. Booth, utilities counsel for the Office of Price Administration, was on the witness stand.

"Which would be the least inflationary, to return this excess profit tax to the Edison customers, to the city of Detroit, or to the Treasury Department?" he asked.

Lee jumped to his feet, objecting that the question was "highly prejudicial." He said the only issue in the case is whether Edison rates are fair or unfair.

Booth said he had no desire to avoid the question. He said he considered public utility rates a direct part of the nation's economic stabilization program.

"Our position is that a reduction in public utility rates would definitely be in the interests of the program," he said. "Some aspects of the cost of production have been unavoidably increased. A rate reduction would help to offset them and maintain the general level of commodity prices. There is nothing in the national interest contrary to a reduction in rates."

"I don't object to that explanation but I do object to the question," Lee said. "You cannot test the reasonableness of utility rates by whether more money in the pockets of the public is inflationary."

The state commission completed its hearing on July 26th. Gilbert T. Shilson, chairman of the commission, promised an early decision.

The city wound up its case with testimony from Richard D. Sullivan that the company could absorb part of the loss in revenue resulting from a $10,000,000 rate reduction by eliminating a $1,500,000 annual postwar reserve charge.

New Power Plant Urged

CONSTRUCTION of a new $5,200,000 municipal power plant in Waterworks park, to be doubled in size upon realization of an increase in power demand predicted for ten years hence, was recommended to the Detroit public lighting commission last month.

The recommendation, which contemplates that the new plant would be operated in addition to the present $9,000,000 Mistersky power plant, was made following a 6-month survey by the engineering firms of Smith, Hinchman & Grylls, Inc., of Detroit, and Burns & Roe, Inc., of New York.

Louis J. Schrenk, general superintendent of public lighting, said the survey would cost somewhat less than the budgeted $50,000 ceiling.

Although one major purpose of the study was to determine the feasibility of a municipal venture into direct commercial power sales, the engineers recommended against any further extension of the city's activities in this respect.

R. C. Roe, president of the New York firm, explained that in his view the city is already active in the commercial field by virtue of the fact that it produces power for the Detroit Street Railway, street and public building lighting, and for housing projects.

Minnesota

FPC Postpones Hearings

THE Federal Power Commission on July 31st announced its postponement to September 8th of the hearings previously set for the fifth of August at Washington, D. C., on matters involved in the determination of the actual legitimate original cost of the Blanchard

hydroelectric project (Project No. 346) and the Winton project (Project No. 469), Minnesota Power & Light Company, Duluth, licensee. The postponements were made in response to applications filed by the company on July 27th.

The hearings set for September 8th will be held to reopen the records on the matters involved in the determination of the actual legitimate original cost as of May 31, 1927, of the Blanchard project and to determine, among other things, accounting to be prescribed for charges reserved for further consideration at a previous hearing. The Blanchard project is located on the Mississippi river in Morrison county, Minnesota. The Winton project is located on the Kawishiwi river connecting Garden lake and Fall lake in St. Louis and Lake counties, Minnesota.

Minnesota Power & Light, subsidiary of American Power & Light Company, recently filed a recapitalization plan with the Securities and Exchange Commission. The plan is designed both to effect the necessary adjustments demanded by the Federal Power Commission, to reduce property accounts to the basis of original cost, and to satisfy requirements of the Public Utility Holding Company Act.

The plan is not to be voted on by stockholders but will become effective by court order after its approval by the SEC.

Minnesota Power & Light Company's surplus as of April 30th amounted to $7,339,125. This figure fell far short of the $19,264,222 amount which the FPC ordered charged to surplus to take care of property write-downs.

In order to preserve the subsidiary's surplus account the parent company, American Power & Light, proposes as part of the plan to donate to Minnesota 865 shares of 7 per cent preferred, 225 shares of 6 per cent preferred, 878 shares of $6 preferred, and 1,450,000 common shares of the latter company, as well as American's entire interest in Superior Water, Light & Power Company, Pike Rapids Power Company, and Topeka Land Company.

The investment so surrendered by American Power & Light has a book value of $17,575,635. The latter would still retain control of Minnesota through ownership of the entire common stock which upon consummation of the plan would comprise 550,000 shares of $10 par value, compared with 2,000,000 such shares at present.

As part of the plan Minnesota's publicly held 7 per cent and $6 preferred stocks would be exchanged for new $100 par 5 per cent preferred on a share-for-share basis. In return for this holders of present senior stocks would receive cash payments of $6.66 and $3.33, respectively, for each share of 7 per cent and $6 stock so exchanged, plus accrued dividends to the effective date of the plan.

Mississippi

New President Elected

LONNIE P. SWEATT, vice president and general manager of the Mississippi Power Company since 1930, was recently elected president and general manager, succeeding the late Barney E. Eaton, of Gulfport, who died July 18th. Mr. Eaton had served as president and general counsel of the company since 1924.

The new president is a native of Montgomery, Alabama, and graduated from Alabama Polytechnic Institute in 1915 with a BS degree in electrical engineering.

Mr. Sweatt has participated in many phases of the state's development and has been particularly active in its industrial growth. Recently he was appointed by Governor Thomas L. Bailey to a 4-year term on the Mississippi Agriculture and Industrial Board.

Missouri

City Bond Issue Compromised

THE Missouri Constitutional Convention last month rejected a proposed provision authorizing Missouri cities and towns to issue revenue bonds for the acquisition of utilities by a majority vote.

The constitutional convention did, however, approve a provision authorizing the issuance of such bonds by a four-sevenths vote.

The action of the convention was regarded as a compromise between those interests opposed to changing the present law and those seeking a provision to authorize revenue bond issues by a bare majority vote of the local electorates, regardless of the size of the city involved.

As approved by the convention the proposed new constitution to be submitted to the voters will contain a section authorizing all cities and towns by a four-sevenths vote to buy or construct waterworks, gas works, electric light plants, heating and power plants, and airports which are revenue producing, by issuing bonds, the principal and interest of which are to be paid only from the plants' operating revenues.

The present Missouri law forbids smaller cities (less than 75,000 population) from is-

suing revenue bonds under such circumstances, while the larger cities can issue such bonds only by a four-sevenths vote.

Sale Approval Granted

THE Federal Power Commission last month conditionally authorized the Union Electric Company of Missouri to buy virtually all of the electric facilities of the Laclede Power & Light Company and the Laclede Gas Light Company, thus eliminating competition in the electric utility business in the city of St. Louis.

The base purchase price would be $8,600,000. All of the electric facilities of the two companies are included except the Catalan street plant of the Laclede Gas Light Company in St. Louis.

The authorization was subject to conditions with respect to the accounting treatment to be accorded the excess of the purchase price over the original cost of the acquired facilities needed by Union to serve all customers in St. Louis. This excess was estimated by Union at $2,125,733.

The FPC order would require the company to charge the excess to earned surplus. Union originally proposed that this amount be debited to the plant accounts and amortized over the remaining life of the properties.

The FPC said Union had produced no evidence that the merger would result in substantial economies in operating expenses, or any other measurable benefits to ratepayers.

Union, according to its application for the merger, does about 85 per cent of the electric utility business in St. Louis, and Laclede about 15 per cent. The Missouri Public Service Commission has approved the proposed acquisition.

Reserve Fund Earnings Go to Customers

MISSOURI utilities, including Union Electric Company of Missouri, Laclede Gas Light Company, and other electric, gas, water, telegraph, telephone, and heating companies, were ordered by the state public service commission last month to allow their customers the benefit of earnings on the utilities' depreciation reserve accounts. This is to be done by crediting the earnings to the depreciation accounts at the rate of 5½ per cent a year, beginning next January 1st. The commission did not specifically order any change in rates of the companies to consumers.

In the Springfield Gas & Electric Company Case, which served as the precedent for the order, the commission found that the depreciation reserves were invested in the company's business and were thus earning 6½ per cent or more. It was decided to allow 1 per cent for handling, and the 5½ per cent rate requirement was arrived at in this manner. Any company claiming a lower earning rate must apply to the commission before October 1st.

Nebraska

Rate Cut Assured

RATE reduction to users of city electric current was assured recently when the Lincoln city council, by vote of 6 to 1, Virgil Kitrell alone dissenting, approved two resolutions, one pertaining to residential and commercial consumers and the other to municipal departments and activities. Reductions become effective as to all bills and accounts due and payable on and after September 1st. The consumer saving is reckoned at approximately 10 per cent.

"I deem this an improper time," said Kitrell. "This reduction should be available to all who want it but because of the freezing of customers and materials, we cannot now make it available to all. We can't get the necessary materials for expansion."

"But it will be available to all as soon as we can get the materials," replied Lincoln's Mayor Marti.

New York

Plan Modification Urged

THE state public service commission recently announced that it had asked the Long Island Lighting Company to consider certain suggested modifications in its over-all plan of recapitalization, now on file with the commission.

Long Island's proposed recapitalization involved a reduction in the par value of outstanding preferred stock from $100 to $60 a share and the issuance of 550,000 shares of no par common stock with a stated value of $5 a share to replace the present 3,000,000 shares outstanding. These changes would result in an unearned surplus of approximately $10,800,000.

In an opinion covering the case, Milo Maltbie, chairman of the commission, said that the company's plan is a step in the right direction, but suggested the following three changes:

1. That the common stock remain at a stated value of $1 a share, which would result in an increase of about $2,000,000 in the unearned surplus account of the company.

2. The preferred stock, upon which there is an accumulation of unpaid dividends, be given more influence in the management of the company through voting rights.

3. That the unearned surplus resulting from changes in the utility's capital structure be earmarked specifically for any adjustments which the commission may require in the company's property accounts.

Discussing the commission's recommendations, Mr. Maltbie said:

"The precise question now before the commission is whether the proposal is a sufficient improvement over existing conditions and whether, in view of our limited powers, the objections to the plan and the difficulties of revision are outweighed by the advantages obtained. The plan does have certain marked advantages. It is undoubtedly a step in the right direction."

Brooklyn Gas Plan Rejected

THE Brooklyn Union Gas Company's comprehensive program for refunding $48,000 of its outstanding indebtedness was rejected on July 28th by the state public service commission. This action climaxed a series of developments with respect to the refunding during the last week of July, the most important of which involved an offer by the banking firm of Halsey, Stuart & Co., Inc., to give the utility better terms on the sale of $12,000,000 of debentures than it had arranged.

Originally the company had proposed to issue $30,000,000 of 3¾ per cent mortgage bonds, to be placed privately with sixteen insurance companies and other institutions, and $12,000,000 of 4¼ per cent debentures.

The commission permitted the company to sell the $12,000,000 of debentures to Halsey, Stuart & Co. and associates, but at an interest rate of 4 per cent. As to the bonds, the commission turned down the proposed placement of the obligations with the insurance concerns and suggested that Brooklyn Union could do better by submitting the issue to competitive bidding.

This marks the first time the state regulatory agency has advocated the competitive bidding method for security financing.

Issues of prime importance to New York state utilities have arisen in this proceeding, it was reported, and the opinion by Milo R. Maltbie, commission chairman, asserts the doctrine that the commission is bound by its powers and duties under the law to see to it that a public utility shall finance its requirements on the best possible terms obtainable because of the public interest involved in the financial soundness of a company rendering public utility service.

North Carolina

Vote Utility Franchise

AN unofficial total of 3,051 Raleigh voters last month approved 2,773 to 278 in a special election a proposed ordinance whereby the Carolina Power & Light Company will be given a 40-year franchise to provide electric and transportation facilities for the city. Under the ordinance the power company will relinquish an unlimited franchise granted in 1890 to S. W. Jacobs for similar services and one of the two under which it now is operating.

The second of the present franchises was granted the Raleigh Electric Company in 1905 for a 40-year period and will expire May 24, 1945.

The CP&L Company has been operating under the two franchises since 1908.

In commenting on the election L. V. Sutton, president and general manager of the power company, said: "We are most gratified at the results of the election. We greatly appreciate such an expression of confidence on the part of the people of Raleigh."

No Cab Number Restriction

A MUNICIPALITY has no right under the general law to restrict the number of taxicabs which may be operated within the corporate limits of the municipality, if the operators are in a position to comply with the other provisions of the general law regulating taxicabs, State Attorney General Harry McMullan ruled last month in a digest of opinions.

In another case relating to municipalities, he ruled:

A municipality has no authority to sell a municipally owned public utility without the approval of a majority of the qualified voters of the municipality.

Oregon

Schedule Again Normal

SERVICES of the Oregon Motor Stages were disrupted recently as an estimated one hundred drivers in Portland and Astoria refused to work, apparently in protest to a wage recommendation handed down recently by a War Labor Board panel, but company and union

spokesmen said operations were almost normal as drivers heeded back-to-work requests.

Harold Oathes, business agent of the AFL Motor Coach Employees' Union, announced that the drivers who quit without union authorization were returning to work.

Hardest hit during the one-day walkout were schedules between Portland and coastal points—particularly over the Columbia river highway.

R. W. Lemen, company president, said, however, that "some" service was maintained on all routes, although schedules could not be followed because of the lack of drivers.

Shop employees at Astoria joined the drivers in the walkout, it was reported.

Lemen said there had been no interruption in Corvallis, Salem, and Eugene service.

Dissatisfaction with the wage recommendations of the WLB panel resulted in the partial stoppage, Oathes stated. He said the men returned to work when advised that the regional WLB would conduct another hearing on the bus wage case before a final decision is made.

Pennsylvania

Amended Plan Submitted

AN amended plan for reorganization of the York Railways Company, of York, pending since November 30, 1937, was filed in the United States District Court at Philadelphia last month. It provided for payment in full of $4,432,000 first mortgage bonds and 3,186 shares of its 5 per cent $50 par preferred stock, together with interest on the bonds and accrued dividends of $18.75 on the stock.

The corporation is an operating unit in the Associated Gas & Electric system and formerly ran trolley and bus lines and a gas and electric utility in York, which have been disposed of.

The plan called for liquidation of the company and its merger with the Glen Rock Electric Light & Power Company, which will operate out of York as the York Edison Company. No action would be taken by the court until advisory reports have been received from the state commission and the SEC.

Army Takes Over

ATTEMPTING to end a 3-day strike which paralyzed war industry and other business in the Philadelphia area, the U. S. Army, on orders from President Roosevelt, took over the property and operations of the Philadelphia Transportation Company. A few hours after Major General Philip Hayes seized the city's transit system, the workers voted to return, apparently with some understanding that eight Negro operators who were being trained in compliance with an order of the Fair Employment Practices Committee would no longer be employed during Army operation. Later, however, strikers reversed their decision and remained away from their jobs pending a written guaranty that the Negro workers would be excluded.

Sporadic racial disturbances continued to mark the trouble scene as Army officials attempted to get operations back to normal.

Tennessee

Drivers Resume Work

NASHVILLE'S public transportation system was back to normal following resumption of service by the Southern Coach Lines after 500 bus drivers and maintenance men recently decided to end a 2-day walkout.

Although the decision to return to work was made by a vote of 251 to 45, some men attending the meeting declared that they would go out again unless they finally succeeded in securing an 85-cent-per-hour wage scale.

The walkout, which was the second in the city in four months, was in protest against a regional War Labor Board ruling that allowed the drivers 80 cents an hour.

Washington

PUD's Lose Fight

PUBLIC utility districts of Douglas and Okanogan counties lost their fight recently to compel Washington Water Power Company to file with the state department of public service a schedule of rates at which it would furnish power to the districts.

The state supreme court affirmed judgment of Thurston County Superior Court, which had upheld action of the department in sustaining demurrers filed by the company to the complaints of the PUD's.

The high court concluded that complaints of the PUD's did not state facts sufficient to constitute causes of action.

The Latest Utility Rulings

Allowance for Cost of Money Must Be Supported by Evidence

THE rate order of the District of Columbia commission, in *Re* Washington Gas Light Co. (1943) 53 PUR (NS) 321, was set aside by the district court for the District of Columbia on the ground that the commission's conclusions were not supported by substantial evidence. A mere general opinion of the commission, unsupported by findings of fact based on substantial evidence, said the court, is of no effect.

The question before the commission was what constituted a reasonable allowance based on the cost of common capital stock. Witnesses used earnings-price ratios as the principal method of ascertaining the investors' appraisal of the return required on common stock. Commission witnesses found this to be 11.68 per cent and company witnesses fixed it at 10.98 per cent, both exclusive of the cost of financing. The earnings-price ratio of six gas companies to which the commission witness testified was 10.54 per cent. The commission adopted neither of these facts but substituted 9 per cent as a reasonable allowance and amended the sliding-scale order of 1935 so as to reduce the primary rate of return from 6½ to 5¾ per cent. This action was held to be arbitrary and void.

The commission also had found that the amount of expenses for legal services was unreasonable and disallowed one-half of the amount. The court found no evidence in the record justifying this reduction. *Washington Gas Light Co. v. Public Utilities Commission of District of Columbia et al. (Civil Action No. 22173).*

Increased Gas Rates Unjustified

THE New York commission, in an investigation of rates of the Cabot Gas Corporation and the Pavilion Natural Gas Company, held the Cabot Gas had failed to justify a proposed regular rate for natural gas supplied to Pavilion and that it had failed to justify a so-called emergency rate which had been permitted to become effective. Pavilion, as a consequence, had failed to justify an emergency rate based on the increased cost of gas purchased from the Cabot company.

Cabot Gas Corporation in 1936 constructed a 14-inch main in New York state, originally extended from the Pennsylvania boundary to the plant of the Eastman Kodak Company in Rochester. Service was rendered to various utilities and industries. Later, a shortage of natural gas developed and Eastman Kodak and other industrial customers were lost. Portions of the line were abandoned, but attempts to abandon all operations in New York state were denied by both the Federal Power Commission and the New York commission. Commissioner Burritt, delivering the opinion for the commission, summarized the basis for denial of higher rates, stating:

> In view of all the above facts and circumstances, namely, the complete change in the nature and the amount of business of Cabot Gas; that company's failure to collect the total cost of gas from its consumers and particularly from Eastman Kodak in the

early years of the enterprise and its consequent failure to amortize the cost of the line which was built primarily for the purpose of serving this large industrial customer; the present gross excess capacity of the 14-inch main for any purpose for which used; the difficulty, if not the actual impossibility of recouping the remaining unamortized cost of the pipe line; the failure of the companies to show the cost of rendering service to their present customers; together with the recent development of a new source of natural gas for the area served and the possible effect of this gas on supply and price, the proposed increase in the regular rate for gas filed by Cabot Gas with this commission has not been justified and should be canceled.

The company's proposal to allocate the entire cost of all purchased emergency gas to the Pavilion Natural Gas Company and Producers Gas Company of Olean appeared to the commission to be unreasonable because the system had other customers and there appeared to be wide discrepancies in rates charged.

Commissioner Burritt also made observations as to the question of Federal Power Commission jurisdiction over Pavilion Natural Gas Company. Pavilion, he said, is purely a local distributing company and in spite of the Federal Power Commission's assumption of jurisdiction over this company it was "most difficult to understand the tenuous reasoning by which it assumes such jurisdiction."

The Federal Power Commission had claimed jurisdiction because that company sold gas derived from interstate sources at wholesale to the Churchville Oil & Gas Company (FPC Docket G-374). *Re Cabot Gas Corp. et al. (Cases 11,410, 11,411, 11,416).*

Sale of Electric Line to Coöperative Disapproved In View of Consumers' Objection

An application of Pennsylvania Edison Company for approval of agreements with Valley Rural Electric Coöperative, Inc., providing for the sale of certain electric distribution and service lines, facilities, and appurtenances, was denied by the Pennsylvania commission on the ground that there was no assurance that the consumers involved would secure any advantage if the application were approved. On the contrary, there was said to be specific and convincing evidence that their rates would be higher and their service less satisfactory.

Since the coöperative did not generate any portion of the energy which it sold, and since it intended to purchase energy distributed through these lines from Pennsylvania Edison, approval of the transaction would also introduce the coöperative as a middleman between the generating public utility and the consumers.

Consumers on one of the lines summarized their protests to the sale as follows:

(1) That the service of Pennsylvania Edison had been eminently satisfactory with light interruptions, while on neighboring lines of the coöperative service interruptions had been long.

(2) That the cost of the line to Pennsylvania Edison was the basis for minimum charges (which would soon be eliminated), whereas if the coöperative purchased the line the patrons must in some manner underwrite the cost to the coöperative, thus duplicating their payments.

(3) That the rates of coöperative were higher than those of Pennsylvania Edison.

(4) That the coöperative feeder line traversed an undeveloped section of country, whereas the Pennsylvania Edison feeder line was located along the highway and was accessible to repairs.

Generally speaking, said the commission, it laid itself open to the charge of evasion of duty if, without compelling evidence, it permitted a Pennsylvania public utility under its control as to rates

and service to transfer patrons to a body over which it had no jurisdiction. Since the legislature had deemed commission supervision salutary, the commission could not lightly approve its negation.

Commissioner Buchanan, in a dissenting opinion, criticized the disapproval of "amicable agreements" reached between the parties after arm's-length bargaining.

He said that during the course of the proceeding the electric company had permitted employees to circulate petitions opposing the application and "to make erroneous statements concerning the transfer," and otherwise indicated an adverse position to its own application. He said that the evidence was conclusive that service of the coöperative was at least equal to that of the company and that this service would be improved. He said he was informed that the REA policy would have been applied so that no increases in rates would have resulted. *Re Pennsylvania Edison Co. (Application Docket No. 62810).*

Company to Benefit from Possible Reduction In Counsel Fees on Security Issue

THE SEC approved an exchange by Northern Indiana Public Service Company of new preferred stock for outstanding preferred stock and redemption of shares not exchanged. Exemption was granted under § 6 (b) of the Holding Company Act for the issue and sale of securities. Jurisdiction was reserved as to the payment of legal fees and expenses, estimated at $21,500, but in this connection the commission said:

> In view of the provision in the proposed agreement between the company and the successful bidder whereby the fee and disbursements of independent counsel are to be paid by such bidder, it is apparent that prospective bidders will include the estimated amounts of such fee and disbursements among the expenses to be incurred by them. Hence, in fixing their bids, the underwriters obviously will determine their price at a point which will at least permit a recoupment of all expenses including counsel fees. Consequently, the sum to be paid to independent counsel for their services is in effect to be paid by the company, and it seems reasonable that, in the event that the estimated fee and expenses are required to be reduced in the exercise of the jurisdiction which we herein reserve, such reduction should inure to the benefit of the company rather than to the successful bidder. Accordingly, our order will contain a condition requiring that the proposed exchange and purchase agreement to be entered into between the company and the successful bidder be modified so as to provide that in the event the fee and disbursements of independent counsel be reduced ultimately below the estimated total of $21,500, the amount of any such reduction shall be paid over to the company by the successful bidder.

Re Northern Indiana Public Service Co. (File No. 70-882, Release No. 5134).

Water Company's Complaint against Contract Of Borough with Other Company Dismissed

THE Pottsville Water Company and the borough of Schuylkill Haven executed a contract in 1927 whereby the company agreed to furnish the borough with water over a 30-year period. On August 9, 1943, the Silver Creek Water Company and the borough executed a contract, to be considered effective as of June 12th and to continue until its termination six months after the close of the present war. This latter contract was filed August 15, 1943, as a tariff to become effective October 15, 1943. The tariff made changes in the existing tariff then on file by establishing rates for furnishing water to the borough.

The Pottsville Water Company on October 14, 1943, filed a complaint against

the new contract, alleging that the borough and the other company had failed to file the contract at least thirty days prior to its effective date, that the contract was illegal, unreasonable, inequitable, and unfair to the complainant and violated its rights under its prior contract. The commission dismissed the complaint.

The statute requiring the filing of a contract at least thirty days prior to its effective date contains a proviso that it does not apply to contracts which provide only for the furnishing of service at regularly filed and published tariff rates. When the new contract was executed there was no regularly filed and published tariff.

The commission made the following statement:

> Consequently, at that time, the contract did not provide only for the furnishing of service at the regularly filed and published tariff rates. As it stands now, however, the contract is merely an agreement to pay what are now the regularly filed and published tariff rates. So far as the commission is concerned, the question of the validity of the contract is now moot.
>
> The contract was not filed as a contract under the provisions of § 911; it was filed by Silver Creek Water Company as a tariff. Section 302 of the Public Utility Law requires that every public utility shall file with the commission tariffs showing all rates established by it; and, under § 303, these are the only rates which the utility may demand or receive. The action of the utility in filing its tariff is *ex parte*. So long as the tariff establishes the rates to be collected or enforced, it is immaterial what form it takes. If, as here, a contract is filed as a tariff, it is immaterial whether the contract as such is valid or invalid. Initially, the only pertinent inquiry is whether the paper filed as a tariff shows what the rate is. If it does, the tariff, in the absence of complaint, becomes effective.

The complaint, the commission held further, did not raise any question within its jurisdiction, since the contracts were private in character; and, if the complainant's rights under its contract had been infringed, it must seek redress in court. *Pottsville Water Co. v. Silver Creek Water Co. et al. (Complaint Docket No. 13947).*

Wisconsin Commission Lacked Jurisdiction over Security Issues of Illinois Corporation

In response to a petition by the Reconstruction Finance Corporation requesting a declaratory ruling upon the question of the validity of an order entered in 1932 approving security issues subject to conditions, the Wisconsin commission made the following conclusion of law:

> That on June 24, 1932, the public service commission of Wisconsin did not have jurisdiction or authority to authorize, to approve or disapprove, or to impose conditions upon the issuance of the securities, whose issuance was purported to be approved or authorized under the conditions as specified in and by the order of said date made in the above-entitled proceeding.

The order of June 24, 1932, as supplemented and amended by an order dated September 14, 1932, purported to authorize the Chicago, North Shore & Milwaukee Railroad Company, as a Wisconsin corporation, to issue bonds and notes, and it imposed a condition restricting the pledge or sale of such securities. The order spoke of the railroad as a "Wisconsin corporation," and apparently it was assumed by the commission that the corporation had its domicile in Wisconsin.

The fact was, however, that the company was an Illinois corporation.

The Reconstruction Finance Corporation had requested that an order be made expunging the order from the records of the commission, or in the alternative that the restrictions contained in that order on the sale of bonds be removed and the sale be authorized without restriction. The commission did not see how either of these requests could properly be granted. The record, it was said, was a part of the commission's public files and

it did not have power to expunge it. It was and would be a part of the records and files of the commission in spite of any statement or order to the contrary which the commission might make.

Likewise, if the commission did not have power to make or impose the conditions upon the sale of the securities as it was purported to be made and imposed by the order of June 24, 1932, the commission was without authority to remove any such condition at the present time. Therefore, it was concluded that the declaration of nullity, binding not only upon all parties to the proceeding but upon the commission as well, would serve the purpose. *Re Chicago, North Shore & Milwaukee Railroad Co. (2-SB-27).*

Extent of Commission Action on Preëmption Filing by Coöperative

A PROTEST by the Pennsylvania Edison Company against preëmption papers filed by Valley Rural Electric Coöperative, Inc., under § 418 of the Public Utility Law, was dismissed by the Pennsylvania commission on June 27th when it appeared that the preëmption, even if valid, would expire on July 6th. The commission said its determination on the question raised by the company concerning repeal of this section would become moot on the latter date so far as the instant proceeding was concerned, and thus would not be subject to appeal.

The company had also questioned the good faith of the coöperative, but the commission said that the situation was such that no determination of that question need be made in the present case. The commission added:

> However, we deem it appropriate to state our opinion that whenever preëmption papers are tendered for filing, the commission, upon its own initiative or upon the suggestion of an interested person, may inquire into all matters pertinent to the formal validity of the tendered filing before accepting the filing as a compliance with § 418.
>
> The scope of such inquiry should not, we think, be precisely defined in advance of the presentation of a case which may require such a definition. It is enough for present purposes to say that we do not consider the bona fides of coöperative to be a matter for our determination in the instant case, and that no issue has been raised relating to the accuracy of the preëmption maps, service on the utility, or other matters of such character.

Re Valley Rural Electric Coöperative, Inc. (Coöperative Association Docket No. 7).

Commission Approval Not Required for Acquisition of Transportation Equipment

AN application by Allegany Gas Company for approval of the purchase from New Penn Development Corporation, an affiliate, of certain tractors, trucks, and trailers no longer useful to the latter company, but which would be essential to the gas company, was dismissed by the Pennsylvania commission on the ground that such a purchase did not require approval. Section 202(e) of the Public Utility Law provides for commission approval of the purchase of tangible or intangible property used or useful in the public service.

Thus, said the commission, it is the character of the property as determined by the purpose of the section which is controlling. It appeared to the commission that the sole purpose of the legislature in writing this section into the Public Utility Law was to prevent the acquisition or transfer of property used or useful in the public service to the detriment of the public. The commission said:

> Upon considering the test in relation to the purpose of the section, it would appear that the legislature intended that property which is subject to our jurisdiction is such

property, tangible or intangible, which is *presently* or *now* used or useful in the public service. From a consideration of all the facts we are of the opinion and so find and determine that the proposed purchase does not involve property which is now used or useful in the public service and that no transfer of patrons is involved. This being the case the purchase does not require our approval and for this reason the application must be dismissed.

Commissioner Buchanan, in a dissenting opinion, referred to a statement in the majority opinion that this property would be "essential" to the gas company. He said:

It was the "finely spun logomachy which is the delight of the lawyers and judges" that made the administrative process necessary.

It was such dangerous playing with words by the Pennsylvania appellate courts that has destroyed the legislative intent contained in the Public Utility Law on at least three occasions. Now the disease seems to have crept into the commission itself.

What we say is *essential* and therefore useful in the first paragraph of this order we say is nonessential and *useless* in the last paragraph.

Re Allegany Gas Co. (Application Docket No. 62821).

Other Important Rulings

THE Massachusetts commission, in authorizing an electric company to operate in a town, ruled that blanket authority requested should not be granted, but that the company should be granted the right to serve any person who might require electricity in the future from its lines as now located on certain streets in the town, provided that no extension to these lines or any other such extensions within the towns mentioned in the petition should be made without first complying with the requirements of Chap. 164, § 30, General Laws. *Re Plymouth County Electric Co. et al. (DPU 7131).*

The Massachusetts commission approved the purchase by a street railway company of a tract of land adjacent to a presently owned amusement resort in order to round out the company's property holdings from the location of its amusements and the center of its park to the main highways through the rights of way leading to the amusement park from the public highway. *Re Holyoke Street Railway Co. (DPU 7206).*

The commission is not deprived of jurisdiction to modify its refusal to approve municipal consents for intrastate bus operation because one member of the commission died and was replaced before such modification, according to a ruling of the supreme court of New Jersey. *Hudson Bus Transp. Co. Inc. v. Board of Public Utility Comrs. 37 A(2d) 636.*

The supreme court of Nebraska held that its judgment vacating a lease of a radio station on the ground of constructive fraud and ordering a return of the property to its former owner in a representative suit does not encroach upon the statutory powers of the Federal Communications Commission to license a radio station or to transfer, assign, or annul a radio license. *Johnson v. Radio Station WOW, Inc. et al. 14 NW (2d) 666.*

The Pennsylvania commission held that a contract between a public utility corporation and an affiliated oil company for rental of office and floor space in an office building at an annual rental in excess of $5,000 was a contract requiring commission approval, since a leasehold interest is personal property. Approval was granted. *Re Keystone Pipe Line Co. (Application Docket No. 63318).*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

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VOLUME 54 PUR(NS) NUMBER 2

Points of Special Interest

Titles and Index

TITLES

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MICHIGAN SUPREME COURT

City of Detroit

v.

Michigan Public Service Commission

— Mich —, 14 NW(2d) 784
May 17, 1944; rehearing denied June 30, 1944

CERTIORARI *to review Commission order dismissing petition for reduction in electric rates; order reversed and remanded.*

Expenses, § 4 — Authority of Commission — Excess profits taxes.

The Commission, in the exercise of its discretionary power to exclude from operating expenses items such as avoidable taxes which place unnecessary burdens upon consumers, should consider and exercise its discretion in respect to the exclusion, in whole or in part, of "excess profits" earned under existing rates and on which a 90 per cent profit tax is payable to the Federal government.

(SHARPE, WIEST, and BOYLES, JJ., dissent.)

Before the Entire Bench except Butzel, J.

APPEARANCES: Paul E. Krause, Corporation Counsel, and James H. Lee, Assistant Corporation Counsel, both of Detroit, for petitioner and appellant; Oscar C. Hull and Laurence M. Sprague, both of Detroit, Paul W. McQuillen, of New York city, and Plummer Snyder, of Lansing, for respondent, Detroit Edison Company; Howell Van Auken and Lucking, Van Auken, Schumann & Greiner, all of Detroit, for City Ice & Fuel Co.; Chester Bowles, Price Administrator, Richard H. Field, Acting General Counsel, David F. Cavers, Assistant General Counsel, Harry R. Booth, Utilities Counsel, and A. L. Stein, Attorney, Legal Division, Office of Price Administration, all of Washington, D. C. for Price Administrator; Thomas G. Long, of Detroit, amicus curiae.

BUSHNELL, J.: I am unable to concur in the result reached by Mr. Justice Sharpe, because, in my opinion, affirmation of the order of the Commission will constitute judicial negation of the legislative intent for the creation of the Commission.

The controlling and decisive question is:

May respondent Michigan Public Service Commission, under its statutory power to fix reasonable rates at which a public utility will furnish electricity to the public, exclude from the Commission's consideration all or a reasonable part of $8,000,000 excess profits which it earns under an existing rate charged its consumers and on

which a 90 per cent profit tax is payable to the Federal government.

It is the duty of the Commission, under its statutory power, to fix a just and reasonable rate. This can be accomplished only by balancing the interest of public utility investors and the consuming public. Federal Power Commission v. Hope Nat. Gas Co. (1944) 320 US 591, 88 L ed 276, 51 PUR(NS) 193, 64 S Ct 281.

In the instant case the question narrows down to whether the Commission in passing upon a petition to reduce the rate charged the consumer by the public utility should consider and exercise its discretion in respect to the exclusion in whole or in part of "excess profits" of the character hereinbefore noted. That such "profits" exist may or may not demonstrate that the earnings of the utility are excessive.

In the instant case the Commission disclaims that it possesses any power to consider this matter. It thus completely ignores its discretionary authority to exclude those items from public utility operating expenses which place unnecessary burdens upon the consumer. Obviously in so doing the Commission failed to balance investor and public interests.

The Commission arrived at its conclusion in the instant case upon the erroneous assumption that it was wholly without power to exclude from its consideration in fixing the rate to be charged to the consumer the undisputed fact that the presently approved rate produces "excess profits of approximately $8,000,000 on which there is a 90 per cent excess profit tax." Under such circumstances it cannot be said that a fair and adequate hearing was had before the Commission.

The exclusion of an unnecessary element, such as avoidable taxes, is not inconsistent with the holding of this court in Public Utilities Commission v. Michigan State Teleph. Co. 228 Mich 658, PUR 1925C 158, 200 NW 749, cited and quoted by Mr. Justice Sharpe, and is in harmony with the Hope Case, *supra*. See, also, Vinson v. Washington Gas Light Co. (1944) — US —, 88 L ed —, 52 PUR(NS) 257, 64 S Ct 731.

As I read Galveston Electric Co. v. Galveston, 258 US 388, 399, 66 L ed 678, PUR1922D 159, 42 S Ct 351, which is intimated by my brother as controlling, its authority is limited to normal taxes and not to abnormal and avoidable taxes on "excess profits" even though it must be conceded that the term by which such tax is designated is a misnomer. Excess profits are a question of fact for determination by the Commission.

Without discretionary power to exclude any and all unnecessary elements of expense in determining a just and reasonable rate, the Michigan Public Service Commission would be an impotent body. It could not have been the intent of the legislature that the Commission should lack any necessary power to fix reasonable rates, and the Commission should not be permitted to declare itself impotent. It clearly possesses such discretionary power, and that power should be exercised.

The Commission should not require the utility corporation to reduce its rates for the period during which it has paid excess profits taxes, nor for a period during which it may be liable

for such payment on accrued taxes. It should take into consideration the usual elements of rate determination as well as obsolescence and depreciation of capital assets due to any extraordinary situations arising out of war conditions such as the effect of unusual and heavy wartime loads. It may also consider the time lag in a return to normal conditions and the period elapsing before a redetermination can again be made of a reasonable rate. The public should not be required to pay rates that will yield an extraordinary profit to the utility and the stockholders of the utility on the other hand are at all times entitled to a fair return on their investment.

The order dismissing the petition of the city of Detroit is vacated and the cause is remanded for reconsideration and determination, so that the present rate may be maintained or reduced as the Commission shall determine in the light of our decision herein. No costs.

North, C. J., and Starr and Reid, J., concurred with Bushnell, J.

SHARPE, J., dissenting: This is an appeal in the nature of certiorari from an order of the Michigan Public Service Commission dismissing a petition by the city of Detroit asking for a reduction in the electric rates of the Detroit Edison Company.

In October, 1942, the city of Detroit filed a petition with the Michigan Public Service Commission asking that the Commission issue an order directed to the Detroit Edison Company to show cause why the company should not file a new schedule of rates effective during November and December, 1942, which will effectuate a net income for the accounting year of 1942 of not more than $12,000,000 and file a reduced schedule of rates effective January 1, 1943, under which the company would reduce its existing rates about 25 per cent.

Soon after the above petition was filed, the cities of Dearborn, Highland Park, and Hamtramck, the Michigan Manufacturers' Association, the City Ice and Fuel Company, and the Office of Price Administration of the United States government were permitted to intervene.

The petition filed by the city of Detroit alleges that the Detroit Edison Company will fall into the excess profits tax bracket as defined by the 1942 Income Tax Law, Revenue Act 1942, § 201 et seq., 26 USCA Int Rev Code, § 710 et seq., to the extent of approximately $8,000,000 and will be required to pay 90 per cent of this amount as excess profits taxes; that such excess income has been derived under the present rates and schedules of the Detroit Edison Company; and that such rates and schedules are unreasonable and excessive.

The Office of Price Administration intervened "so that rate increases will be disapproved and rate reductions effected, consistently with the act of October 2, 1942, 50 USCA Appendix, § 901 et seq., and other applicable Federal, state, or municipal law, in order to keep down the cost of living and effectuate the stabilization program."

The other intervenors stressed their special circumstances, but all sought a reduction in rates. The Commission conducted a general rate hearing. There was extensive evidence as to the nature, cost, and value of the as-

sets of the Detroit Edison Company, its income and its expenses and the rate of return to which it is entitled. The Detroit Edison Company presented evidence that its proper rate base was more than $330,000,000. The city of Detroit recommended a rate base of $271,576,000. The Commission did not decide upon the amount of the rate base, but for the purpose of its decision assumed an amount less than that claimed by the city of Detroit.

On July 17, 1943, 50 PUR(NS) 1, 3, the Commission entered an order of which the following is pertinent to the issue involved in this cause:

"Under the laws of the state of Michigan, a regulated utility is entitled to earn a fair return upon the present value of the property devoted by it to public service. Money that has been lawfully spent in rendering service constitutes no part of such a return. The dollar paid out for taxes is no more available as income and return than a dollar spent for labor or any other legitimate expense.

"We have repeatedly stressed the fact that we are a statutory body and possess only the powers conferred upon us by statute. We know of no statute giving us the power to forbid a company the right to charge as an operating expense any tax lawfully incurred by it. Likewise we know of no statute giving us the power to forbid such a company the right to so charge any part of the tax so incurred to operating expenses.

"We therefore find that all taxes are a proper operating charge and they will be so considered in determining the income of the company in this case.

"Such being our opinion in determining whether or not the earnings of the Detroit Edison Company are excessive, we consider such earnings as are available to the company after the payment of income taxes."

The city of Detroit, city of Hamtramck, and the Price Administrator appeal from this order. The city of Detroit contends that the Michigan Public Service Commission, in determining a fair rate of return for a utility, should compute such return completely independent of, and prior to, the application of the excess profits tax rate; and that so-called "war taxes" as distinguished from normal income and other normal levies should not be chargeable as an operating cost.

The Price Administrator urges that the Commission has the statutory power and duty to disallow improper operating expenses including war income and excess profits taxes in determining reasonable rates; that the increased income tax rates since 1939 and the excess profits tax are not operating expenses within the usual meaning of that term and should be disregarded in computing net revenue available for return; and that the allowance of war taxes as an operating expense would be inflationary.

The City Ice and Fuel Company urges that the Commission should be instructed to fix rates after a just balancing of consumer as well as investor interests with any and all pragmatic adjustments necessary in view of abnormal wartimes and conditions.

The Detroit Edison Company urges that the law of Michigan does not empower the Commission to forbid an electric company to charge as an operating expense any tax lawfully in-

curred; and that any tax including income taxes paid the Federal government is a proper element of the cost of operation.

It is to be noted that there is no question raised in this appeal as to the rate base or the reasonable rate of return and these issues are not before the court. The only question we have for decision may be stated as follows: Does the Michigan Public Service Commission have discretionary power to exclude excess profits taxes from operating expenses in determining the rates?

In deciding this question it is necessary to examine the act creating the Commission. The Michigan Public Service Commission was created by Act No. 3, Public Acts 1939 (Comp Laws Supp 1940, § 11017–1 et seq., Stat Anno 1943 Cum Supp § 22.13 (1) et seq.)

Section 4 of the act provides:

". . . All the rights, powers, and duties vested by law in said Michigan Public Utilities Commission, and in the Michigan Railroad Commission and transferred to the Michigan Public Utilities Commission, shall be deemed to be transferred to and vested in the Michigan Public Service Commission hereby created, and shall hereafter be exercised and performed by said Commission. . . . Said Michigan Public Service Commission shall have and exercise all rights and privileges and the jurisdiction in all respects as has been conferred by law and exercised by the Michigan Public Utilities Commission under the laws of this state; . . . . Any order or decree of the Michigan Public Service Commission shall be subject to review in the manner now provided by law for reviewing orders and decrees of the Michigan Railroad Commission or the Michigan Public Utilities Commission. . . ."

Section 6 of the act reads as follows:

"The Michigan Public Service Commission is hereby vested with complete power and jurisdiction to regulate all public utilities in the state except any municipally owned utility and except as otherwise restricted by law. It is hereby vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including electric light and power companies, whether private, corporate, or coöperative, . . ."

The powers of the present Commission to regulate charges for electricity are granted by Act No. 106, § 7, Public Acts 1909, as last amended by Act No. 108, Public Acts 1923 (2 Comp Laws 1929, § 11099, Stats Anno § 22.157) which provides:

". . . In determining the proper price, the Commission shall consider and give due weight to all lawful elements properly to be considered to enable it to determine the just and reasonable price to be fixed for supplying electricity, including cost, reasonable return on the fair value of all property used in the service, depreciation, obsolescence, risks of business, value of service to the consumer, the connected load, the hours of the day

when used, and the quantity used each month."

This being an appeal in the nature of certiorari, we consider questions of law only and will not review questions of fact or weigh the evidence except to determine whether there is an entire absence of evidence or proof on some material fact. The power or authority of the Michigan Public Service Commission to exclude excess profits taxes in determining rates is a question of law.

In Public Utilities Commission v. Michigan State Teleph. Co., 228 Mich 658, PUR1925C, 158, 200 NW 749, we held that the following were proper elements intering into the determination of a just rate:

"The chief elements of just compensation to defendant telephone company are: (a) Operating expense, including administration, labor, interest, taxes, certain items of repair and maintenance; (b) depreciation, physical and functional, including wear and tear of property by use, the constant destruction of property by earth's relentless processes, and supersession and obsolescence of machines and structures by progress; (c) fair return upon the present fair value of the property used and useful in public service." (Syllabus.)

In Galveston Electric Co. v. Galveston, 258 US 388, 399, 66 L ed 678, PUR1922D 159, 169, 42 S Ct 351, it was held that income taxes were properly chargeable as an operating expense. The court there said:

"The remaining item as to which the master and the court differed relates to the income tax. The company assigns as error that the master allowed, but the court disallowed, as a part of the operating expenses for the year ending June 30, 1920, the sum of $16,254 paid by the company during that year for Federal income taxes. The tax referred to is presumably that imposed by the act of February 24, 1919, Chap 18, §§ 230–238, 40 Stat 1057, 1075–1080, which for any year after 1918 is 10 per cent of the net income. In calculating whether the 5-cent fare will yield a proper return, it is necessary to deduct from gross revenue the expenses and charges; and all taxes which would be payable if a fair return were earned are appropriate deductions. There is no difference in this respect between state and Federal taxes or between income taxes and others. But the fact that it is the Federal corporate income tax for which deduction is made, must be taken into consideration in determining what rate of return shall be deemed fair. For under § 216 the stockholder does not include in the income on which the normal Federal tax is payable dividends received from the corporation. This tax exemption is, therefore, in effect, part of the return on the investment."

See also Georgia R. & Power Co. v. Georgia R. Commission, 262 US 625, 67 L ed 1144, PUR1923D 1, 43 S Ct 680; Oklahoma Nat. Gas Co. v. Corporation Commission, 90 Okla 84, PUR1924A 132, 216 Pac 917.

The excess profits tax is somewhat similar to the income tax in that it is a tax the amount of which depends upon a certain net amount arrived at in part by deducting certain operating costs from gross revenue. The excess profits tax is a tax on the income over and above some specified minimum set in the law providing for the

tax. It is a tax that the utility is required to pay and necessarily a part of the costs of operation of that utility. In our opinion the Commission has no discretion in excluding these taxes in determining the operating expense of the utility. The Commission found that in 1942 the earnings, derived from the rates approved, represented a rate of return of 4.75 per cent. If the price of electricity can be reduced and still leave a reasonable return on the fair value of all property as required by 2 Comp Laws 1929, § 11099, then the Commission has a duty to make such reduction in rates.

The order of the Commission is affirmed, no costs are allowed as a public question is involved.

Wiest and Boyles, JJ., concurred with Sharpe, J.

MISSOURI SUPREME COURT

State ex rel. Consumers Public Service Company et al.

v.

Public Service Commission et al.

No. 38680
— Mo —, 180 SW(2d) 40
April 3, 1944; rehearing denied May 2, 1944

EN BANC. APPEAL *from judgment of Circuit Court affirming order of Commission authorizing sale of electrical properties by public utility company to coöperative; affirmed. For Commission decision, see (1942) 47 PUR(NS) 321.*

Appeal and review, § 22 — Moot question — Commission approval of sale — Consummation of sale.

1. An appeal from an order of the Commission approving the sale of utility property to a coöperative organization should not be dismissed after the sale has been consummated on the ground that the question of sale is moot, p. 76.

Monopoly and competition, § 8 — Jurisdiction of Commission.

2. The Commission has full control over allocation of territory to electric utilities and to authorize either monopoly or regulated competition therein, although this must be done on the basis of public interest and not merely because of the interest of the companies involved, p. 76.

Parties, § 1 — Persons interested — Rights involved.

3. No direct pecuniary or property rights, or infringement of civil rights of

a person, must be involved before he can be a party to a proceeding before the Commission, p. 76.

Parties, § 18 — Intervention — Necessary interest.

4. The interest necessary to authorize intervention in Commission proceedings should be the same as that required to become a complainant upon whose complaint a case is commenced, p. 76.

Consolidation, merger, and sale, § 18 — Approval or disapproval — Competitor seeking to acquire same property — Effect of contract.

5. The question whether a coöperative organization which has entered into a contract for the purchase of properties from an electric company should be permitted to acquire the property, or whether another electric company operating in the same general territory should be permitted to acquire the property, must be decided on the basis of whose operation in the area would best serve the public interest under all the circumstances, and not merely upon which could first obtain a contract for purchase, p. 76.

Consolidation, merger, and sale, § 65 — Parties — Intervention —Competing utility.

6. A public utility company operating in the same general territory as another company applying for approval of a sale of its property to a coöperative organization is entitled to intervene in the proceeding to secure Commission authorization, as it is sufficiently "interested," where it seeks to acquire the same properties and the question before the Commission is which one should be permitted to acquire it, p. 76.

Procedure, § 35 — Rehearing — Parties.

7. A public utility company operating in the same general territory as another company which is applying to the Commission for approval of a sale of its properties to a coöperative organization has the right to apply for a rehearing on an order authorizing the sale when it also seeks to acquire such properties, as it is an "interested" party, p. 76.

Appeal and review, § 80 — Parties — Competitor opposing sale.

8. An electric company operating in the same general territory as another electric company which has obtained authorization from the Commission to sell its properties to a coöperative organization not only has the right to intervene in the proceedings before the Commission, but has the right to seek a review in the circuit court and appeal to the supreme court from its adverse decision, p. 76.

Consolidation, merger, and sale, § 65 — Parties — Intervention.

9. A public utility company which does not operate in the same general territory as a company seeking authority for a sale of its property to a coöperative organization is not an "interested" party entitled to intervene in the proceeding, where it has no near-by line and does not seek to acquire any of the seller's properties and does not furnish or propose to furnish any power to a company seeking also to acquire the property, and where its purpose of intervention is to show its consent to the ultimate integration of companies in the territory, p. 76.

Appeal and review, § 80 — Parties — Company opposing sale.

10. A public utility company which does not operate in the same general territory as a company seeking authority for a sale of its property to a coöperative has no right to appeal from a circuit court judgment upholding an order of the Commission approving the sale, p. 76.

Consolidation, merger, and sale, § 2 — Sale to coöperative association.

11. A public utility company may sell its property to an electric coöperative, p. 82.

Consolidation, merger, and sale, § 6 — Jurisdiction of Commission — Sale to coöperative.

12. The Commission has no jurisdiction to hold that a purchase of property by a coöperative from an electric utility company can never be in the public interest, as such a ruling would be in conflict with the Rural Electric Coöperative Act and a contention that such a sale would not be in the public interest must be addressed to the general assembly, p. 82.

Consolidation, merger, and sale, § 22 — Grounds for approval — Character of service.

13. Approval of the sale of electric properties by a public utility company to a coöperative organization was reasonable upon evidence showing the rural character of the communities involved; present poor service; prospect of better service reasonably expected; financial condition, management, and prospects; sentiment of the people in these communities; and their almost unanimous desire to become members of the coöperative, p. 82.

Statutes, § 6 — Validity — Sufficiency of title — Rural Electric Coöperative Act.

14. Section 5415 of the Rural Electric Coöperative Act, defining "rural area" to include a town, is not void because it includes matter not clearly expressed in the title of the act, in violation of § 28, Art 4, Mo Const Mo Rev Stats Ann; the term "rural area" has no such definite and certain legal meaning as to be clear without definition, and the definition made is not unreasonable, p. 84.

Consolidation, merger, and sale, § 21.1 — Acquisition by coöperative — Service to persons receiving electric service.

15. A coöperative is empowered to buy a complete electric system from a public utility company, taking over its existing customers and members, as against a contention that a coöperative cannot take over facilities for furnishing service to persons already receiving central station service; it does not thereby enter into competition with an existing utility to take from it customers who could continue to be served by it in an area served by both, p. 84.

Consolidation, merger, and sale, § 62 — Scope of proceeding — Federal loans to coöperative.

16. Whether the United States government should make loans to a coöperative for the purpose of acquiring electric properties from a public utility company is not a matter for the state Commission to decide in a proceeding to secure approval of the property transfer, p. 84.

Definitions — Rural area — Statutory provision.

Rural area, within meaning of § 5415 of the Missouri Rural Electric Coöperative Act, p. 84.

APPEARANCES: Paul D. Kitt, of Chillicothe, and A. Z. Patterson, and Patterson, Chastain & Smith, all of Kansas City, for appellants; John P. Randolph and Lester G. Seacat, both of Jefferson City, for respondents Public Service Commission of Missouri and members thereof; Russell

N. Pickett, of Trenton, for respondent Grundy Electric Cooperative, Inc.; R. K. McPherson, of Joplin, for Empire District Electric Co., amicus curiae; R. B. Oliver, Jr., of Cape Girardeau, for Missouri Utilities Co., amicus curiae; Roscoe P. Conkling, of St. Joseph, for St. Joseph Ry., Light, Heat & Power Co., amicus curiae; Ludwick Graves and Jacob Brown, both of Kansas City, for Kansas City Power & Light Co., amicus curiae.

HYDE, J.; This is an appeal from a judgment of the circuit court of Cole county (on review proceedings) affirming an order of the Public Service Commission. The order authorized the sale of electrical properties by the Iowa Utilities Company to the Grundy Electric Cooperative. Appellants are electric public utility companies permitted by the Commission to intervene. Our jurisdiction is based on constitutional questions raised.

The following facts are mainly taken (without quotations and with some additions of our own) from the report of the Commission.

A joint application was made by the Iowa Utilities Company (hereinafter referred to as seller), to sell and by the Grundy Electric Corporation, Inc. (hereinafter referred to as coöperative), to purchase that part of the electric system of the seller located in Missouri and used in furnishing electric service to the unincorporated community known as Lineville and the incorporated town of Mercer, and rural customers served by an electric line extending from Lineville to Mercer. All the properties involved in this case are located in Mercer county, Missouri.

An intervening petition was filed by Missouri Public Service Corporation, Missouri Power and Light Company and Consumers Public Service Company, objecting to the approval of the proposed sale and alleging in substance that they are public utilities now serving areas adjacent to the towns in Missouri served by the seller and that they have an ample generating plant and facilities for supplying electric service to such territory; that the acquisition of the seller's properties by the purchaser would amount to unwarranted invasion of the territory served by intervenors and would also frustrate intervenors' plans in the area, thus resulting in injury to the electric service rendered to the public. Further objection was made on the ground that the coöperative, if the sale were consummated, would be required to either operate the seller's properties as a small isolated unit or to rebuild costly transmission lines.

The seller is the owner of an electric generating plant located in the town of Lineville, Iowa, and owns and operates electric transmission and distribution properties in the towns of Lineville and Clio, Iowa, and intermediate points, as well as the electric transmission and distribution properties, involved herein in Missouri. It proposes to sell all the Iowa and Missouri property to the coöperative for $37,750. None of the villages or towns now served by the seller have a population of more than 1,500.

The coöperative, whose principal office and place of business is located in Trenton, Missouri, was originally incorporated under the provisions of

Art 28, Chap 102, § 14406 et seq., Rev Stats 1939, Mo Rev Stat Ann., but it has, since the execution of the sale contract with the seller, elected to convert its corporate existence, under the Electric Cooperative Act, into a coöperative, nonprofit membership corporation under the provisions of § 5402, Art 7, Chap 33, Rev Stats 1939, Mo Rev Stat Ann. (This conversion has been completed.) It is engaged in the distribution and sale of electric energy to its members located in the counties of Grundy, Harrison, Mercer, Sullivan, Linn, and Daviess. It owns a rural electrification distribution sytem of about 430 miles serving 826 members. It is also licensed to do business in the state of Iowa.

All the outstanding common stock of the seller is owned by the Utilities Holding Corporation. There are no outstanding preferred stocks, bonds, or mortgages against said property The property proposed to be sold is old, obsolete, and in need of repairs and betterments to render adequate service to its customers, and revenues have not been sufficient to make them.

The coöperative made application for a loan from the Rural Electrification Administration, with which to acquire and improve the system of the seller and integrate that system with the system now owned and operated by it. A loan in the amount of $118,000 was approved. An officer of the coöperative stated that necessary improvements would be made to the property acquired in order that better and more adequate service may be rendered to the present consumers. The coöperative proposes to make further extensions from the purchased lines to reach unserved persons in rural areas; and to integrate the properties, with that now owned and operated by it, when materials are available at the end of the present emergency. It already has a line within seven miles. By acquiring these properties, the coöperative expected to serve farmers in Wayne county, Iowa (where no coöperative exists), as well as additional farmers in Mercer county, Missouri.

The rates now charged by the coöperative to its members are shown to be slightly lower, in most, instances, than those now charged by the seller. Seven businessmen and electric users now receiving service from the seller stated that all its present customers favor the sale of this property to the coöperative. Ninety-five per cent of these customers, at the date of the hearing, had made application for membership in the coöperative and all but two or three petitioned the Commission for the approval of the proposed sale. No one now receiving electric service from the seller, or any person living in the towns and territories it now serves, entered any protest to the granting of the proposed transfer.

The testimony offered on behalf of Consumers Public Service Company was to the effect that it is a Missouri electric utility, and as such owns and operates an electrical distribution system adjacent to the towns now served by the seller. Its transmission line extends from Brookfield where interconnection is made with the Missouri Power & Light Company's large steam plant. The line of the Consumers Company extends from Brookfield north to Ravanna, and within seven

and a half miles of Mercer, where the seller's transmission lines are. The Consumers Company takes the position that it is ready and willing to purchase the seller's system and to connect it with its existing system, or, if proper priority orders for building the seven and a half miles connecting system line cannot now be obtained, to install an additional unit in the generating plant at Lineville, which unit it now owns and has available; that it is willing to pay $40,000 for the seller's entire system; that it has such a contract made by its president with the Utilities Holding Corporation; that its acquisition of the system will result in improved and adequate service to the public; and that after connection of the seller's system to its system the ownership and operation of the seller's plant at Lineville as a standby or peakload reserve plant will enable it to operate its entire system with greater efficiency and economy, as well as increasing its revenue about $17,000.

However, the offer of the Consumers Company to purchase the seller's property was conditioned upon its ability to completely refinance itself. There was evidence tending to show that at the present time its financial condition is such that it would be unable to buy the seller's distribution system without a refinancing program. There was also evidence offered tending to show that the service now rendered by the Consumers Company to its own customers, in certain areas, has not been satisfactory.

The Missouri Power and Light Company showed that it has ample and adequate sources of electric power for the entire area; that it has large capacity transmission lines extending into the area and now supplies the Consumers Company and Missouri Public Service Corporation with substantially all the electric current used by such companies in their systems; that the most advantageous and logical plan for the integration of the electric systems in the area require the connection of the seller's system with the existing 3-company interconnected system and its eventual acquisition by the coöperative would interfere with the most practical methods of integration of facilities in northwest Missouri.

[1–10] The coöperative filed a motion to dismiss the appeal herein on the grounds that appellants had no substantial interest which would entitle them to intervene before the Commission, to file a petition for rehearing or to prosecute review proceedings; that they cannot appeal from the judgment of the circuit court (affirming the Commission's order) because they are not aggrieved within the meaning of § 1184, Rev Stats 1939, Mo Stat Ann (all references hereinafter made are to Rev Stats 1939 and Mo Rev Stat Ann); and that the question of sale is moot because it has been now finally consummated and the purchased property is now being operated by the coöperative. It is argued that "general laws relating to appeals" are made applicable to Commission review proceedings by § 5693 and that these require a party to be "aggrieved" in order to have the right to appeal. Authorities are cited, holding that this requires a substantial interest to be directly affected; and that this "must be a direct and immediate pecuniary

interest in the particular cause." American Petroleum Exchange v. Public Service Commission (1943) — Mo App —, 176 SW(2d) 533, 534; State ex rel. McKittrick v. Public Service Commission (1943) — Mo —, 52 PUR (NS) 447, 175 SW (2d) 857; State ex rel. Fischer v. Vories (1933) 333 Mo 197, 62 SW(2d) 457, and cases therein cited.

In the Attorney General's Case, *supra*, 175 SW(2d) 857, 862, we pointed out that the Commission is furnished with its own counsel appointed by the governor to generally represent the state in its operations and to enforce its orders in the name of the state; that in addition constituent members of the public in the locality or situation are entitled to partisan representation by a city or other local governmental or private organization (Chamber of Commerce, etc.); and that, while the attorney general could properly intervene when the state had some concrete interest in the particular case, affecting its pecuniary interest, "or one definitely affecting the general welfare of the state or its obligations and functioning," he should not be permitted to always do so because of "interests that actually are private or local" merely because every case before the Commission involves the public interest to some extent. In short, the legislature in establishing the office of counsel for the Commission has provided other representation for that general public interest. We, therefore, held that the attorney general was not interested or aggrieved in such a case. However, we did not hold that an "interested" party could not also be "aggrieved."

We think "interested" is the key provision under the Public Service Commission Act and that it is a broader term than "aggrieved," and this is well illustrated by the American Petroleum Company Case. The Petroleum Company was held not "aggrieved," and its appeal was dismissed, because the order did not act directly upon its rights. However, the ultimate enforcement of that order would have acted directly upon its rights, because the order required cancellation of its lease and the removal of its property from the premises it occupied under its lease. Although not immediately "aggrieved" by the order, it certainly was very much "interested" in it and would be "aggrieved" in any sense of the term by what must result from its enforcement. When an order against such an interested party is affirmed in the circuit court it would seem that he is "aggrieved." It was said in Hornbeck v. Richards (1927) 80 Mont 27, 257 Pac 1025, 1026, where the Code statute gave an "aggrieved party" the right to appeal: "Under the statute respecting the right of appeal, we are of [the]opinion that the proper general rule to be applied is that any party to an action or proceeding having an interest *recognized by law* in the subject matter, which interest is injuriously affected by the judgment, is a party aggrieved within its meaning." So, also, it was held in People ex rel. New York Edison Co. v. Willcox (1912) 207 NY 86, 100 NE 705, 707, 45 LRA (NS) 629, that a rival public service corporation is interested in a proceeding by which the Public Service Commission may, without right, authorize a competing company to is-

sue bonds, and may be "[a] party aggrieved" within a Code statute authorizing review by certiorari.

We, therefore, think respondent's contention (and the decision in the American Petroleum Company Case, *supra*) is based upon too narrow a view of the Public Service Commission Act. In the first place the Commission is not a court and cannot enter a judgment or order that could act directly upon anyone's rights. It is an administrative agency created to supervise, regulate and investigate operations in certain fields in which the public interest is involved. In controversies growing out of these matters, it has authority to make findings of fact upon substantial evidence and to make orders based thereon. If these orders are reasonable and within the power of the Commission, they may be enforced but only by action of the courts in a suit by the Commission for that purpose. Section 5685; Lusk v. Atkinson (1916) 268 Mo 109, 186 SW 703; Atchison, T. & S. F. R. Co. v. Public Service Commission (Mo Sup Ct) PUR1917C 1005, 192 SW 460; State ex rel. Laundry v. Public Service Commission, 327 Mo 93, PUR 1931B 376, 34 SW(2d) 37. Moreover, its orders are made on the basis of what is in the public interest and not to determine private rights in property or otherwise. State ex rel. Rutledge v. Public Service Commission (1926) 316 Mo 233, 289 SW 785. Since no Commission order acts directly and immediately upon the rights, pecuniary interest, or property of a party, it must be apparent that no one could be aggrieved by an order of the Commission in the sense he would be by a court judgment, because it would still take a court action and judgment to enforce any such order. The purpose of the review proceeding under § 5690 is to determine the validity of such orders. The judgment on review is in the nature of a declaratory judgment. If the order is determined to be valid, it is affirmed (declared valid). If it is not obeyed, the Commission can then bring an action to enforce it. If it is found invalid it can only be set aside (declared invalid); but the case in court is then ended and any further proceedings must be before the Commission. We think this disposes of the contention that only a moot question is herein involved.

What interest must be involved to entitle anyone to become a party before the Commission? The Public Service Commission is intended to have very broad jurisdiction in the field in which it was intended to operate. As to public utilities furnishing electricity, § 5646, gives it complete power over rates and services. Section 5649, requires its approval of any new construction or location even though authorized by municipal franchise. Section 5651 prevents the sale, lease, or mortgage of any part of a franchise, works or system of such a utility without the permission of the Commission. By these two latter sections, it was intended to give the Commission full control over allocation of territory to such utilities, and to authorize either monopoly or regulated competition therein. State ex rel. Union Electric Light & P. Co. v. Public Service Commission (1933) 333 Mo 426, 1 PUR(NS) 38, 62 SW(2d) 742; State ex rel. Kansas City Power

& Light Co. v. Public Service Commission (1934) 335 Mo 1248, 8 PUR (NS) 192, 76 SW(2d) 343. This, of course, must be done on the basis of the public interest and not merely because of the interest of the utility companies involved.

No utility company can even maintain rights under contracts against the supervision of the Commission. May Department Stores Co. v. Union Electric Light & P. Co. (1937) 341 Mo 299, 21 PUR (NS) 77, 107 SW (2d) 41. As pointed out in the May Department Stores Case, what is involved is the exercise of the police power of the state. Thus hearings before the Public Service Commission are controversies over the application of this power in the particular circumstances involved. The orders made may ultimately affect private rights (and are invalid if they are arbitrary or unreasonable, beyond the statutory authority of the Commission or constitute an unconstitutional exercise of power); and, therefore, are subject to judicial review. The legislature has provided statutory methods for speedy and efficient review. The question here is: To whom did the legislature intend to make this method of review available? Since the public welfare is involved in every Commission case (and is the controlling factor in its decision), to a certain extent every citizen is interested in all its cases. But it is certainly not intended that every citizen may participate in any case. That would prevent the Commission from functioning efficiently.

It seems clearly intended that no direct pecuniary or property rights, or infringement of civil rights of a person, must be involved before he could be a party to a proceeding before the Commission. Section 5686 provides: "complaint may be made by . . . any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization . . . by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person, or public utility, . . . All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder or causes of actions or grievances or misjoinder or nonjoinder of parties; and in any review by the courts of orders or decisions of the Commission, the same rule shall apply with regard to the joinder of causes [of action] and parties as herein provided. The Commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant."

Section 5687 provides: "Any corporation, person, or public utility shall have the right to complain on any of the grounds upon which complaints are allowed to be filed by other parties"; and § 5688 provides that "such corporations and persons as the Commission may allow to intervene, shall be entitled to be heard and to introduce evidence." Section 5600 provides that hearings "shall be governed by rules to be adopted and prescribed by the Commission." The Commission has adopted Rule 8 on intervention providing: "In any formal proceeding, the Commission may permit any corporation, association, body pol-

itic, or person, having an interest in the result of such proceeding, to intervene and be heard, after opportunity has been given to the party or parties to such proceeding to be heard on such intervention."

Section 5689 provides that "after an order or decision has been made by the Commission any corporation or person or public utility interested therein shall have the right to apply for a rehearing in respect to any matter determined therein." Section 5690 provides for review by the circuit court in the event a rehearing is requested and denied. Under § 5689, only matters stated in the application for rehearing can be considered on review. Section 5690 also says: "The Commission and each party to the action or proceeding before the Commission shall have the right to appear in the review proceedings." For discussion of this provision see State ex rel. Anderson Motor Service Co. v. Public Service Commission (1936) 339 Mo 469, 17 PUR(NS) 304, 97 SW(2d) 116.

Provisions for appeal from the judgment of the circuit court are set out in § 5693 as follows: "The Commission, any corporation, public utility or person or any complainant may after the entry of judgment in the circuit court in any action in review, prosecute an appeal to a court having appellate jurisdiction in this state. Such appeal shall be prosecuted as appeals from judgment of the circuit court in civil cases except as otherwise provided in this article. . . . The general laws relating to appeals to the supreme court and the various courts of appeal in this state shall so far as applicable and not in conflict with the provision of this chapter, apply to appeals taken under the provisions of this chapter."

These provisions make it plain that the Public Service Commission Act provides its own Code for proceedings for judicial review of its orders and that the reference to the general code is only to make appeals subject to the usual rules of appellate procedure where procedure is not otherwise specified in the act. This act itself specifies who shall have the right to be a party to review proceedings both in the circuit and appellate courts. By § 5689 any party "interested" in "an order or decision" of the Commission has the right to apply for a rehearing. There is nothing in any other section to indicate that such an "interested" party shall not have the right (if his application for rehearing is denied) to exhaust all further remedies provided both to obtain review in the circuit court and to appeal from a circuit court decision against him. The Commission's rule on intervention likewise makes "interest in the result of such proceeding" the basis for intervention. Of course, its rule could not enlarge upon the statute, but if its decision that any applicant for intervention is "interested" does have any reasonable basis it should be sustained.

Considering the Public Service Commission Act as a whole, it seems apparent that parties to cases before the Commission, whether as complainants or intervenors are not required to have a pecuniary interest, or property or other rights, which will be directly or immediately affected by the order sought or even its enforcement. The reasonable construction seems to

be that the interest necessary to authorize intervention should be the same as that required to become a complainant upon whose complaint a case is commenced. Any local partisan interest in the situation involved, such as a customer, representative of the public in the locality or territory affected (State ex rel. St. Louis v. Public Service Commission (1927) 317 Mo 815, 296 SW 790); or as a competitor for the same territory or privilege is surely sufficient to show an interest similar to that of complainants described in § 5686 (State ex rel. Kansas City Power & Light Co. v. Public Service Commission, *supra*); and, therefore, is likewise a sufficient basis for intervention. So also it should certainly be sufficient to authorize intervention if the ultimate enforcement of the order sought would directly affect property rights as in American Petroleum Exchange v. Public Service Commission, *supra*, and the ruling to the contrary therein is overruled.

Therefore, when two utilities can reasonably be said to be operating in the same general territory, and the question before the Commission is whether or not one of them should be allowed to take additional locations which either might make arrangements to serve, the other must be held interested in the matter in the sense the term "interested" is used in § 5689. That was the situation in this case. Both the coöperative and the Consumers Company had lines approximately 7 miles of the property sought to be acquired. Both were operating in the same area, even in the same county, in which this property was located and both (according to the evidence) had negotiated to acquire it and could make arrangements to do so and to operate it. The question of which one should be permitted to acquire it must be decided on the basis of whose operation of the area would best serve the public interest under all the circumstances and not merely upon which could first obtain a contract for purchase. A contract found to be against public interest or the Commission's regulatory policy could not be permitted to stand in this situation any more than a contract for unapproved rates. We hold that Consumers Company was sufficiently "interested" to have the right to intervene and likewise the right to apply for a rehearing, when the Commission decided that a competitor could take over these new locations adjoining the general territory in which both were operating. Our conclusion also is that this company had the further right, because of such interest, to seek a review in the circuit court and appeal to this court from its adverse decision. The motion to dismiss must be overruled as to the Consumers Company.

We think the same thing is true of the Missouri Power & Light Company. It showed that it had large capacity transmission lines extending into the area with adequate sources of power for the whole area, and that it now supplies and would continue to supply the Consumers Company with substantially all the power it uses. (And would supply these new properties.) It further showed that its plans were to take over the Consumers Company (and also the other intervenor) and integrate their systems into its own and thus sought to eventually acquire the seller's properties here-

in involved. The motion to dismiss the appeal as to it should also be overruled. However, there is nothing in the record to show that the Missouri Public Service Corporation is interested, in any reasonable construction of that term. It had no near-by lines, did not seek to acquire any of the seller's properties and did not furnish or propose to furnish any power to the Consumers Company. Apparently the purpose of its intervention was to show its consent to the ultimate three company integration. Certainly this could have been shown by evidence, and it might have supported the other intervenor's contentions by a showing similar to that of an amicus curiae in a case in court, but that does not show an "interest" in the result sufficient to constitute a reasonable basis for intervention. Therefore, as to it, the motion to dismiss the appeal should be sustained and its appeal is dismissed.

[11–13] On the merits appellants' principal contentions are that the Commission was without lawful power to authorize a regulated public utility system, dedicated to serving the public generally, to be transferred to a coöperative membership company, without determination of the effect upon the public interest; that § 5415 (defining rural area to include a town) is void because it includes matter not clearly expressed in the title of the Rural Electric Coöperative Act in violation of § 28, Art 4, Mo Const Mo Rev Stats Ann; that the coöperative is not authorized to acquire an electric system for furnishing electric service to persons who are receiving central station service, contrary to the terms of the Federal Act; and that if the Commission had reviewed the facts in evidence before it, its conclusion must have been that the transfer was not in the public interest. As to the first proposition appellants say that the Commission refused to determine the question of the public interest involved and in effect held that the Missouri Rural Electric Cooperative Act repealed § 5651 in so far as such coöperatives were concerned. They also say that the Commission mistakenly conceived that the only interest involved was that of the stockholders of the seller and the members of the coöperative. They further say the theory of the Commission was that if such a coöperative made a contract for the purchase of any utility property in a town under 1,500 population, it was required by the Coöperative Act to approve the transfer regardless of the effect of the transfer upon the public interest in the particular situation. They contend that refusal to pass on this question of public interest made the order unreasonable, arbitrary, and unlawful.

This contention is based upon the following language in the Commission's report: "The Commission is of the opinion that the only question involved in this proceeding is whether or not the public interest will be served by the proposed transfer of the seller's property to the coöperative. The intervenors contend in their brief that it will not be in the public interest to permit a regulated utility to sell to a coöperative. The Commission has previously passed on this question in Re Van Buren Light, Power & Ice Co. ([1942] 45 PUR(NS) 482, 485, for authorization of sale of property to the Black River Electric Cooperative) in which we held:

. . . 'The Commission is of the opinion and finds that it has no authority to take a position as to what is "in the public interest" *with reference to the question presented in said paragraph* in view of the positive purpose stated in the Rural Electric Cooperative Act.' (Our italics.) (There is considerable argument in the brief as to what question was meant by this reference.) 'Corporations are created by the legislative arm of the government; their powers and purposes are defined by the legislature. It is presumed that the general assembly intended to promote the public interest not only in the creation, but in the definition, of corporate purposes and powers.

" 'Consequently, the Commission cannot hold, we believe, that it is not in public interest for the Black River Electric Cooperative upon its conversion, and becoming subject to the provisions of the Rural Electric Coöperative Act, to acquire by purchase the properties of the applicant and to thereafter supply electric energy to its members in that area.' " (47 PUR (NS) at p. 326).

The Commission then made the following ruling on the present case: "The only jurisdiction the Commission can have over the coöperative business or property, if it converts under the Rural Electric Cooperative Act, is to be found in § 5389 of the Revised Statutes of Missouri, 1939. Section 5389 relates to the safety of its lines and electric interference with the lines of other utilities. The Commission has no jurisdiction concerning the manner by which a coöperative comes into existence, how it secures or disposes of its properties. However, § 5651, Rev Stats Mo 1939, confers jurisdiction upon this Commission to authorize or reject the sale of public utility properties.

"Under the showing that has been made by the utility furnishing the service, the Commission is of the opinion that the seller be permitted to sell its system to the coöperative and be relieved from the obligation of furnishing service to this community as a public utility. . . .

"After careful consideration of the evidence and contention of the parties in interest, we are of the opinion that the application should be granted." (47 PUR(NS) at pp. 326, 327.)

We think it is clear from a consideration of the whole report of the Commission (its finding of facts, stated at the beginning of this opinion, as well as its final ruling) that it only meant to overrule appellants' contention that it was against the public interest for any coöperative under any circumstances to ever acquire any properties of any existing operating public utility. The Commission so decided on the ground that the legislature had by § 5388 authorized such coöperatives to make such purchases. The Commission pointed out that it "had also many times permitted regulated public electric utilities to sell their utility properties to municipalities" likewise unregulated by it. We think it meant if it sustained appellants' contention by holding that no such purchase could ever be in the public interest then it would be making a ruling in conflict with the Rural Electric Cooperative Act. We agree and hold this contention of appellants is one that must be addressed to the general assembly. Moreover, we think

the Commission did consider and decide the question of whether, under the particular circumstances of this case, it would be in the public interest (including the interest of the public in the whole area involved) to approve or deny the proposed transfer, and that it based its approval upon the conclusion that this transfer would be in the public interest. Furthermore, we hold that such a conclusion was reasonable upon the evidence showing the rural character of the Missouri communities involved, their present poor service, the prospect of what better service might be reasonably expected from either applicant for the territory, the financial condition, management, and prospects of both, the sentiment of the people in these communities and their almost unanimous desire to become members of the coöperative. (Of course the Commission had no authority to approve or disapprove the sale of the Iowa properties.) Our view also disposes of appellants' constitutional contentions (violation of due process and equal protection clauses of the state and Federal Constitutions by making an arbitrary classification in favor of coöperatives) based on the argument that the Commission decided § 5651 was inapplicable to purchase of electric generating and transmission properties by coöperatives.

[14] Appellants' contention that subsection (a) of § 5415 is broader than the title of the Rural Electric Coöperative Act cannot be sustained. The title commences thus: "An act authorizing the formation of nonprofit coöperative corporations, without capital stock, for the purpose of furnishing electric current for lighting, heating, and power purposes to its members in rural areas; defining terms used therein, enumerating the activities and powers of such corporations"; etc. Laws 1939, p. 298.

Section 5415(a) is as follows: "'Rural area' shall be deemed to mean any area of the United States not included within the boundaries of any city, town, or village having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both the farm and nonfarm population thereof."

Appellants say: "There is no provision in the title of this act which would indicate that rural areas were to include towns and villages, urban areas, not in excess of fifteen hundred inhabitants, no provision in the title that coöperatives were authorized to furnish electricity in towns and villages of less than 1,500 inhabitants." There are, however, statements that coöperatives are authorized for furnishing electric current in rural areas; that terms used are defined; and that activities and powers of such coöperatives are enumerated. The term "rural area" has no such definite and certain legal meaning as to be clear without definition, and the definition made is not unreasonable. See People ex rel. Oak Hill Cemetery Asso. v. Pratt (1891) 60 Hun 582, 14 NY Supp 804. Furthermore, the same definition had already been set out in the Federal Act. Title 7 USCA § 913. We hold that this title is sufficient for compliance with the constitutional requirement.

[15, 16] Appellants' further contention (that a coöperative cannot take over facilities for furnishing

electric service to persons already receiving central station service) is based on its argument that "the purpose of Federal Act (§§ 902–904, Title 7 USCA) was to loan money to Rural Electric Cooperative corporations organized for the purpose of supplying electricity to persons in rural areas not receiving central station service." Appellants say that our State Act and the Federal Act are in pari materia and must be construed together. They say that the State Act must be construed as limited by the Federal Act and this requires the ruling that "the coöperative is not empowered to purchase an electric system to furnish electricity to persons in rural areas who are already receiving central station service." However, the coöperative was buying a complete system, and taking over its existing customers as members, and was not entering into competition with an existing utility to take from it customers who could continue to be served by it in an area served by both. Of course, whether the United States government should make loans for this purpose under the Federal Act was not a matter for the Commission to decide. (For a construction of the Federal Act prior to the passage of the Missouri Rural Electric Cooperative Act see Missouri Power & Light Co. v. Lewis County Rural Electric Coöp. Asso. (1941) 235 Mo App 1056, 149 SW(2d) 881.) The Missouri Act refers to no other law and is complete in itself. Certainly our legislature could authorize a coöperative to make such a purchase as this whether it could borrow the money from the United States government or not. Of course, if sufficient consumers of the area would not become members of the coöperative (so that it could legally serve all prospective consumers at least within the 10 per cent limit above its membership) the Commission could not properly authorize a transfer, but the contrary was true here. We must hold that the provisions of § 5388 (when construed with § 5415) are broad enough to authorize this purchase, and we find no restrictions elsewhere in the act (as was true in the Indiana Act cited by appellants) which in any way limits this authority so that it would have to be construed as appellants contend.

The judgment is affirmed.

All concur.

MISSOURI PUBLIC SERVICE COMMISSION

Re Missouri Southern Public Service Company et al.

Case No. 10,383
May 26, 1944

APPLICATION *by public utility company and coöperative corporation for approval of sale of property to the coöperative, surrender of certificates of convenience and necessity issued to the utility corporation, and dissolution of utility corporation; granted subject to conditions.*

Consolidation, merger, and sale, § 65 — Parties — Intervention.

1. An electric company furnishing all the power used by another company and by a coöperative, under separate contracts, has sufficient interest to be entitled to intervene in a proceeding to obtain approval of the sale of the electric company's property to the coöperative, p. 93.

Consolidation, merger, and sale, § 65 — Parties — Intervention.

2. Public utility companies not connected in any way with the lines of an electric company and a coöperative to which it proposes to sell its property do not have sufficient interest to be entitled to intervene in Commission proceedings to obtain approval of the property transfer, where there are no agreements with any of them; they own no securities of either applicant; they serve no area or customer within or near the seller's distribution system; and no showing is made that the acquisition would have any effect upon the operation of any distribution system owned and controlled by them or either of them, p. 93.

Consolidation, merger, and sale, § 65 — Parties — Interveners.

3. An application for Commission approval of a transfer of property from an electric utility company to a coöperative was determined as if intervention by several other electric companies was proper where they had been permitted to intervene prior to a judicial ruling denying the right to intervene under such circumstances, p. 93.

Consolidation, merger, and sale, § 2 — Right to sell property — Absence of public detriment.

4. A public utility should be allowed to sell its property devoted to public use unless the sale is detrimental to the public, p. 94.

Consolidation, merger, and sale, § 6 — Jurisdiction of Commission — Sale to coöperative — Financial structure of purchaser.

5. The Commission, although having no jurisdiction over the control of service, rates, financing, accounting, or management of a coöperative operating under the Missouri Electric Coöperative Act, is authorized to inquire into the financial structure of a coöperative for the purpose of determining whether or not any injurious effects will result to the public from

the sale of electric properties to the coöperative by a public utility company, p. 94.

Consolidation, merger, and sale, § 25 — Factors affecting approval — Capital structure of coöperative purchaser.

6. An application for approval of the sale of electric properties by a public utility company to a coöperative should not be denied on the ground that the capital structure of the purchaser is contrary to the Commission's policy with respect to the authorization of security issues by public utilities, where the coöperative is controlled by its members, the purchaser does not propose to offer any securities to the public and the shares of stock having a par value of $5 have been and will be sold only to members (and only one share to each member), shares of stock will not be offered to the public or purchased as a financial investment or speculation, no dividends will be paid and such stock is not freely alienable, the long-term debt is evidenced by notes issued to the United States government and is being continuously retired, and where in view of the facts and circumstances the capital structure will not be injurious to the interests of the creditor, the purchaser, the members, or the public, p. 94.

Consolidation, merger, and sale, § 20 — Grounds for approval or disapproval — Purchase price — Sale to coöperative.

7. An application by a public utility company and a coöperative for approval of a sale of property of the former to the latter should not be denied because the agreed purchase price appears to be excessive in the light of the Commission's finding of value of the seller's property for rate-making purposes in an earlier proceeding, where it does not appear to be excessive according to investment cost and estimated cost of reproduction recorded on its books; where the properties and areas served were inspected and appraised by the Rural Electrification Administration engineers and the purchase price was thereafter agreed upon after negotiations and by arm's length bargaining; and where it appears that the value for sale purposes may have been fixed according to the formula of three times the normal gross revenue, it appearing further that the purchase price will not entirely pay the seller's open-account indebtedness to its parent company, p. 95.

(WILSON, Commissioner, dissents in separate opinion.)

By the COMMISSION: This case is before the Commission upon a joint application of the Missouri Southern Public Service Company (hereinafter sometimes referred to as seller) and New-Mac Electric Cooperative, Inc. (hereinafter sometimes referred to as purchaser) for permission to sell the electric transmission and distribution lines, system and other facilities of the seller to the purchaser and for an order authorizing the cancellation and surrender of Certificates of Convenience and Necessity No. 5107 and No. 6262, heretofore issued by the Commission to the seller and also authority permitting the Missouri Southern Public Service Company to dissolve.

The case was heard by members of the Commission at the hearing room of the Commission in Jefferson City, Missouri, on the 25th day of October, 1943, after due notice had been given to all interested parties. An officer of each of the applicants appeared in person and were represented by counsel. Arkansas-Missouri Power Corporation, Missouri Utilities Company, Em-

pire District Electric Company, Consumers Public Service Company, East Missouri Power Company, Kansas City Power & Light Company, Missouri Edison Company, Missouri Gas & Electric Service Company, Missouri Power & Light Company, Missouri Public Service Corporation, and St. Joseph Railway, Light, Heat and Power Company (hereinafter sometimes referred to as interveners) filed an intervening petition on October 21, 1943 objecting to the approval of the sale for several reasons therein alleged. When the case was called for hearing the applicants filed a motion to strike the intervening petition on the ground that the interveners had no legal interest in the proceeding. The Commission after duly considering the same overruled the motion to strike the intervening petition and permitted the interveners to participate in the case.

The evidence presented to the Commission shows that the Missouri Southern Public Service Company is an electric public utility corporation duly organized and existing under the laws of the state of Missouri, with its principal office and place of business in the city of Rolla, Missouri. It is a wholly owned subsidiary of Associated Electric Company, a Delaware corporation, which is an intermediate registered holding company under the Public Utility Holding Company Act of 1935. The Associated Electric Company is a subsidiary of Associated Gas and Electric Corporation. Dennis J. Driscoll and Willard L. Thorp are trustees of Associated Gas and Electric Corporation, appointed in proceedings for the reorganization of the corporation, pursuant to the Bankruptcy Act, by the United States district court for the southern district of New York, and as such trustees are registered as a holding company under the Public Utility Holding Company Act. On August 13, 1942, the Securities and Exchange Commission issued its order requiring the trustees of the Associated Gas and Electric Corporation to cause the disposition of their direct and indirect ownership, control and holding of securities issued and properties owned, controlled, or operated by, inter alia, Missouri Southern Public Service Company.

The seller is the holder of Certificate of Convenience and Necessity No. 5107, issued by this Commission on April 1, 1927, which authorizes it to operate and maintain an electric distribution system in the city of Cassville and the villages of Exeter, Ridgeley, Wheaton, and Rocky Comfort, Missouri, and intermediate points. It is also the holder of Certificate of Convenience and Necessity No. 6262 issued by this Commission on May 28, 1939, which authorizes it to operate and maintain an electric distribution system in the towns of Washburn and Seligman, Missouri, and in the vicinities of said towns. It owns and operates electric transmission and distribution lines and facilities in the counties of Barry, McDonald, and Newton. The seller does not have any generating equipment, but purchases its power from the intervener, Empire District Electric Company. The power is delivered to the seller through a connection with its lines about three miles west of Cassville. The seller's property consists primarily of electric distribution systems in the towns of Cassville, Exeter,

Washburn, Seligman, Wheaton, and Rocky Comfort. Cassville being the principal and largest town served. It has a population of 1,201. These towns, except Rocky Comfort, are interconnected by a 11,400 volt 3-phase transmission line. Rocky Comfort is connected to the transmission line by a 2,300-volt 3-phase line. The system also consists of substations at Cassville, Wheaton, and Seligman. The lines extend out from the towns into the rural areas. The seller serves approximately 1,015 customers of whom 150 are farmers.

The New-Mac Electric Cooperative, Inc., is a coöperative corporation duly organized and existing under the provisions of Art 28, Chap 102, Rev Stats of Missouri, 1939, with its principal office and place of business at Neosho, Missouri. The purchaser has, since the execution of the contract with the seller, elected to convert under the Electric Coöperative Act into a coöperative, nonprofit, membership corporation, by virtue of the provisions of § 5402 of Art 7, Chap 33, Rev Stats of Missouri, 1939. The purchaser owns and operates a rural electric distribution system of approximately 500 miles of line in Barry, Jasper, McDonald, and Newton counties, Missouri, and is now engaged in the distribution and sale of electric energy to its members located in said counties. The purchaser's distribution system was constructed in the latter part of 1939. It started serving its first customers in February, 1940. At the end of 1940 it had 610 customers connected with its lines and at the date of the hearing there were 1,060 customers. It also was shown that approximately 820 additional members have paid fees and are now waiting to be connected to the purchaser's lines.

The seller and purchaser have entered into a written agreement dated February 27, 1943, wherein the seller agreed to sell and the purchaser agreed to purchase all electric transmission and distribution lines, systems, facilities, and appurtenances thereto, owned or operated by seller in the state of Missouri and certain other properties and assets, including rights and franchises, therein described, for a base cash consideration of $170,000, subject to certain adjustments provided in the contract. The contract was offered and received in evidence and the execution thereof had been duly authorized by the stockholders and board of directors of both the seller and purchaser.

The purchaser proposes to finance the purchase through an allotment of funds of $181,000 made by the Rural Electrification Administration of the United States government. The total amount of the purchase price will be advanced by the Rural Electrification Administration out of the allotted fund of $181,000. The balance of that allotted fund will be advanced for the necessary engineering and overhead in connection with the sale of the property.

The purchaser proposes to operate the property and continue service without interruption or diminution to the present customers of the seller at the purchaser's existing rates or at rates of the seller. The rates of the purchaser to its members are slightly lower than those now charged by the seller. It also intends to employ the seller's operating personnel.

The purchaser's distribution system

is now adjacent to and parallels to a certain extent the system to be acquired from the seller.

The purchaser, upon the consummation of the sale, intends to integrate the seller's system with its electric system and to integrate its system with additional distribution lines which it proposes to construct into adjacent unserved rural areas when materials for such integration and construction become available. It was further shown that the extension of service by purchaser into unserved rural areas would not be feasible without the acquisition of the properties of the seller. The area in which the seller operates is so surrounded as to offer little opportunity for growth to the seller as such, other than that possible in the communities already served.

Witnesses testified that the electric consumers of the seller were highly in favor of the sale and that there was absolutely no opposition to the sale on the part of any consumer with whom they were familiar. The seller has approximately 1,015 customers and of this number 869 have signed an application to become members of the purchaser if and when the sale is consummated. In this connection a resolution of the town council of Cassville, approving the sale, was introduced and received in evidence. The record discloses that no customer of the seller or purchaser in any way objected to the sale of the property herein and there seems to be no objection whatever to the sale, except the objections made by the eleven power company interveners. In this connection the record shows that the only intervener that could have an interest in this case is the Empire District Electric Company, as it furnishes all the power under separate contracts to both the purchaser and seller. None of the other interveners are directly connected with the seller's system or serve any customers in the seller's territory and the seller has no contract with any of the other utilities nor do they own any stock, bonds, or other securities, or obligations of either of the applicants. There was no showing made that the proposed acquisition would have any effect on the operations of any electric system owned by the interveners.

It was shown that the seller's franchise with the city of Cassville contains a reservation on behalf of the city to buy the property of the seller in the corporate limits of Cassville. The purchaser has entered into an agreement with the city of Cassville, approved by the purchaser's board of directors, which provides that, upon the acquisition of the property, the city will have the choice of receiving service from the coöperative or from a Barry county coöperative or operate a municipal system in the city of Cassville and that the purchaser will sell or release, on a proportionate basis of cost, that part of the lines that come within the city boundaries of Cassville.

There was testimony and exhibits introduced in evidence pertaining to the financial condition of the purchaser, all of which has been given our careful consideration. It was shown that on April 30, 1943, the purchaser had a total "utility plant" cost of approximately $396,887.53. This together with current and other assets, less depreciation reserve, amounts to approximately $419,883.60. Against

this the purchaser will have a long-term indebtedness secured by a mortgage lien on all of its property to the United States government in the sum of approximately $401,287.23, and other liabilities of $5,314.38, or a total liability, as of April 30, 1943, of $406,601.61. The total net worth of the purchaser, as of April 30, 1943, was shown to be $13,281.99.

At the present time the purchaser has executed to the United States government three long-term mortgage notes secured by a deed of trust and supplement deeds of trust on all of its properties as follows: One note dated June 10, 1939, in the amount of $299,000 bearing interest at 2.73 per cent; one note dated November 15, 1940, in the amount of $151,000 bearing interest at 2.46 per cent; and one note dated June 5, 1942, in the amount of $181,000 bearing interest at 2.48 per cent. The full amount of the first note has been advanced and $96,747 of the second note had been advanced as of April 30, 1943, and such amounts of the last note will be advanced for the purpose of paying the purchase price and overhead of the proposed sale. The notes provide that no interest is to be paid thereon during the first thirty months. The notes are to be amortized and paid over a 25-year period, commencing thirty months after the date of the notes. The principal and interest payments on the notes vary as the notes mature.

It was also shown that the purchaser had made prepayment in advance of the date due of its loans to the United States government in the amount of approximately $13,000.

Upon the consolidation of the two properties it was estimated that the purchaser's gross income for the year ending July 1, 1944, would amount to $108,104.48 and that its estimated net income would be $9,073.24.

There was considerable testimony and cross-examination of witnesses on the subject of the value of the seller's property, all of which has been given our careful consideration. It would be impossible to detail all the evidence pertaining thereto in this report and order and still keep it within the bounds of reason. However, we shall briefly state that it was shown that as of April 30, 1943, the physical plant property or "fixed capital" of the seller was carried on its books at $203,-172.51, against which depreciation and retirements had been charged in the amount of $19,456.43, leaving net depreciated book value of $183,716.08. This value was stated on the basis of estimated direct cost of reproduction, determined by Edward J. Chaney, engineer as of December 31, 1929, plus construction overheads and intangibles (organization financing and going value), computed on the basis of the percentage of direct cost allowed for such items by the special statutory courts, eastern district of New York, in the case of Brooklyn Borough Gas Co. v. Prendergast (1926) PUR 1927A 200, 16 F(2d) 615; plus subsequent additions at cost to the company less retirements.

It was further shown that the seller originally purchased the property in 1925 and 1926 from other utility operators. The property investment accounts of the seller to December 31, 1930, were recorded on its books at $156,054.88. In this connection it is noted (1934) in 21 Mo PSCR 86, 97, 98, 6 PUR(NS) 269, that the

Commission's accountants submitted audits of the property investment accounts of the seller and reported that they were unable to ascertain the original cost of the properties, for the reason that the books of account of the former owners could not be located and they recommended that the recorded property investment account of the seller be not accepted as representing either the original cost of construction or the value of the properties for several reasons. The Commission engineers submitted estimates of the investment in the seller's property, after a study had been made of all available records and where the property was not determinable from the records, the prudent investment in the particular item was based on a study of material prices, labor rates, and performances prevailing at the time of the original installation of that unit of the property and on this basis the estimated investment in the property devoted to public service was found by the Commission to be $82,493 as of December 31, 1929. The Commission also at that time found the reproduction cost at $92,750 and also found the present fair value of the property of the seller used and useful in public service, as of June 30, 1932, in the sum of $95,000.

At this hearing Mr. William C. Ross, the Commission's accountant, was called as a witness by interveners and testified that the annual reports of the company from December 31, 1929, to December 31, 1942, disclosed net additions and betterments in the sum of $50,059.76. Adding these additions and betterments to the investment cost found by the Commission in 21 Mo PSCR 86, *supra*, and using a per cent condition of the property of 82.5 per cent, which was the average per cent condition testified to by the officers of the company, he computed that the depreciated value of the property, as of December 31, 1942, was $109,356. On the basis of the cost of reproduction of the property ($92,750), as found by the Commission in said case as of December 31, 1929, and adding the net additions since that time and using the same per cent condition, he calculated that the present value of the property was $117,817.75.

The record shows that the seller's gross revenue has increased from approximately $32,000 in the year 1932 to approximately $58,000 in the year 1942.

The physical property and the areas served were inspected and appraised by the Rural Electrification Administration engineers and thereafter the purchase price of the property was agreed upon after negotiations and by arm's-length bargaining.

The seller has no bonds or preferred stock. There are 200 shares of common stock of which Associated Electric Company owns 195 shares and 5 shares are held by the officers and directors for qualifying purposes. None of the $170,000 purchase price will be paid to the stockholders as such, but will be used to retire $183,000 open account indebtedness now owed by seller to the Associated Electric Company for advances made to the seller by it. The seller is now obligated to pay 6 per cent interest on this indebtedness limited to an amount not in excess of the seller's net income for the year.

The foregoing is substantially a

summation of the facts from the evidence, as we find them.

[1–3] At the commencement of the hearing, counsel for applicants objected to the intervention by interveners. The Commission at the time overruled the objection and permitted interveners to participate in the case for the reason the question had not been definitely passed upon by the appellate court and also that the evidence to be presented might show that the interveners would have some interest in the case. However, since the hearing the supreme court has recently handed down an opinion in the case of State ex rel. Consumers Pub. Service Co. v. Public Service Commission (1944) — Mo —, 54 PUR(NS) *ante*, p. 71, 180 SW(2d) 40, in which we are given a yardstick to govern us in determining what parties have the right to intervene in cases of this nature. Based upon the holding in that case, it is clear from the facts presented herein that the Empire District Electric Company is the only intervener which has shown sufficient interest to be entitled to intervene. None of the other interveners are connected in any way with the lines of the applicants. There are no contracts or agreements for service, maintenance, power, or for any other purpose whatever with any of the other interveners. They own no stock, bonds, or other securities of either of the applicants and serve no area or customer within or near the seller's distribution system and no showing was made that the acquisition would have any effect whatsoever upon the operation of any distribution system owned and controlled by them or either of them. However, since the Commission permitted the intervention we will determine the matter as if the intervention was proper as to all the interveners.

Many of the contentions and objections of the interveners to the proposed acquisition, as set forth in their intervening petition, have been held to be without merit in the recent decision of the supreme court in State ex rel. Consumers Pub. Service Co. v. Public Service Commission, *supra*.

We have in several recent cases permitted regulated electric utilities to sell their property to an electric coöperative where it has been shown that the sale will not be detrimental to the public interest and where the towns served are less than 1,500 population and where the consumers of the utility did not object to the sale. We have always conditioned the authorization upon the coöperative being organized or converted under the Rural Electrification Administration Act (being Art 7, Chap 33, Rev Stats of Missouri, 1939) and to operate thereunder. Case No. 10,370, in Re Citizen's Electric Co. (Mo 1944) 54 PUR (NS) 40, and Case No. 10,332 in Re Lentner Transmission Line (Mo 1943) 53 PUR(NS) 157 and cases therein cited.

In this case the purchaser has indicated its intention to convert and operate under the Rural Electrification Administration Act if and when the Commission grants permission to acquire the properties herein involved. The evidence clearly shows that there was no opposition voiced by the present consumers of the seller to the sale and in fact all the evidence tends to indicate that they are highly in favor of the sale and willing to become members of the purchaser. None of the towns now

served by seller have a population exceeding 1,500.

[4] The only remaining question involved in this proceeding is whether or not it will be detrimental to the public interest to authorize the transfer. The law seems to be well settled that a public utility should be allowed to sell its property devoted to public use unless the sale should be detrimental to the public. This was clearly declared in State ex rel. St. Louis v. Public Service Commission (1934) 335 Mo 448, 459, 5 PUR(NS) 230, 240, 73 SW(2d) 393, 400: "The owners of this stock should have something to say as to whether they can sell it or not. To deny them that right would be to deny to them an incident important to ownership of property. . . . A property owner should be allowed to sell his property *unless it would be detrimental to the public.*" (Italics supplied.)

The record discloses that the public will be benefited to a certain extent by the proposed acquisition. The purchaser intends to integrate the seller's system with its system and with contemplated extensions of its system when materials become available. This will provide electric service for many rural people and also electric service to farmers in outlying districts. The contemplated extensions into the area now served by the seller would not at this time be feasible without the acquisition of the seller's property. The area in which the seller now serves is so surrounded as to offer seller little opportunity for growth other than that possible in the communities already served. The record clearly shows that the present consumers of the seller are highly in favor of the sale and the Commission in determining this matter must give some consideration to the desires and wishes of these consumers, as they represent the public which should be the most interested herein.

[5] The 1939 Missouri Electric Cooperative Act under which the purchaser is in the process of converting, provides in § 5389, Missouri Revised Statutes, 1939, that the Commission shall have no jurisdiction over the control of the service, rates, financing, accounting, or management of a coöperative operating thereunder. However, we are of the opinion that we are authorized in determining a case of this nature to inquire into the financial structure of the coöperative in determining whether or not any injurious effects will result to the public therefrom.

[6] In this case the record shows that on April 30, 1943, the purchaser had a total depreciated "utility plant," together with current and other assets, all aggregating the sum of $419,883.60. Against this there was an indebtedness of $406,601.61, leaving a total net worth of $13,281.99.

It might be said that the capital structure of the purchaser is contrary to the Commission's policy with respect to authorization of security issues by public utilities. We try to require a larger percentage of equity capital in comparison to total fixed debt, yet we have no hard and positive rule fixing ratios and each case is determined according to the existing facts and circumstances presented. In this case the purchaser is a nonprofit coöperative and controlled by its members. The purchaser does not propose to offer any securities to the public

and the shares of stock having a par value of $5 have been and will be sold only to those applying for membership and only one share sold to each member. The shares of stock will not be offered to the public or purchased as a financial investment or speculation. No dividends will be paid and such stock is not freely alienable. The long-term debt is evidenced by notes issued to the United States government by the purchaser and is being continuously retired by payments thereon. We assume that the United States government is equipped to protect its own interest and while the shareholders or members of the purchaser have no considerable money invested, yet they are very much interested in continuous availability of a sufficient supply of low-cost electricity.

The purchaser is now meeting all payments on its long-term indebtedness as they become due and in fact has made prepayments in advance of the due date in the sum of $13,000. Although the payments on the loan will become greater as the time goes on, we believe that the purchaser's revenue, after the acquisition of the property, will be ample to enable it to meet the payments on the loan as they fall due. It is, therefore, the opinion of the Commission, after considering all the facts and circumstances as developed by the evidence, that the capital structure of the purchaser will not be injurious to the interests of the creditor, the purchaser, the members, or the public, and we do not feel warranted in denying the application herein on that ground.

[7] The agreed purchase price to be paid for the property appears to be excessive in light of the Commission's finding of value of the seller's property for rate-making purposes in 21 Mo PSCR 86, 6 PUR(NS) 269, however, it would not appear to be excessive according to the investment costs of the seller and the estimated direct cost of reproduction as determined by the seller's engineer, which is now recorded on its books. The record does not disclose on what basis the seller and purchaser arrived at the purchase price, except that it was stated that the physical property and the areas served were inspected and appraised by the Rural Electrification Administration engineers and that the purchase price was thereafter agreed upon after negotiations and by arm's-length bargaining. Perhaps the purchaser and the Rural Electrification Administration staff considered, in loaning the money to buy and in the negotiations for the sale, the formula which has been frequently used for electric utility properties in fixing the value of the property for sale purposes at three times the normal gross revenues. Here the gross revenue for the year ending December 31, 1942, amounted to approximately $58,000 and the evidence tends to show that from 1932 the seller's revenue has gradually increased. There is nothing in the record to indicate anything other than the gross revenue from the seller's property will continue to be what it was in 1942, or continue to increase.

In considering whether or not the purchase price is so excessive as to justify us in denying the application on that ground, we must take into consideration that the seller, now has $183,000 open account indebtedness, which it owes to its parent company

and that the $170,000 purchase price will not entirely pay that indebtedness in full. The seller has no bounds or preferred stock and all of its common stock is owned by the parent company, except five shares held by officers and director for qualifying purposes.

The Commission, after having considered all the evidence with respect to the reasonableness of the purchase price, is of the opinion it is not justified in denying the application on that ground.

None of the interveners presented any evidence that would tend to show that the acquisition would have any material effect whatsoever upon the operation of any distribution system owned or controlled by them or either of them. The intervener, Empire District Electric Company, has separate contracts with the seller and purchaser to furnish them power, however, counsel for both applicant and interveners stated in the record that there would be no question raised in this proceeding in regard to these contracts. The terms of the seller's contract provide that it can be assigned. None of the interveners voiced any interest in purchasing the seller's property or any part thereof. The orders of the Securities and Exchange Commission require the parent company to dispose of its interest in the seller company and as far as the record is concerned no one else, other than the purchaser, is interested in acquiring the seller's property.

After careful consideration of all the evidence the Commission is of the opinion that, if the purchaser converts itself under the Rural Electrification Administration Act, Art 7, Chap 33, Rev. Stats of Missouri, 1939, and operates thereunder, the granting of the application will not be detrimental to the public and that it should be granted.

It is, therefore,

Ordered: 1. That if before the effective date of this order the New-Mac Electric Coöperative, Inc., a coöperative corporation of Neosho, Missouri, shall have fully complied with the provisions of § 5402, Art 7, Chap 33, Rev Stats of Missouri, 1939, the Missouri Southern Public Service Company, a corporation of Rolla, Missouri, shall be and is hereby authorized upon such compliance to sell and transfer its electric transmission and distribution lines, system, equipment, rights, contracts, and franchises, all as described in contract filed and mentioned herein, to said New-Mac Electric Cooperative, Inc., for the contract price of $170,000, subject to certain adjustments as provided in said contract.

Ordered: 2. That after the provisions in *"Ordered:* 1." have been complied with and completed the Missouri Southern Public Service Company, a corporation, will thereafter be relieved from the obligation as a public utility in furnishing electric service to the communities it now serves and Certificates of Convenience and Necessity No. 5107 and No. 6262, heretofore issued by the Commission, will be canceled.

Ordered: 3. That upon compliance with the conditions and provisions of *"Ordered:* 1." hereof the Missouri Southern Public Service Company, a corporation, is hereby authorized to take the necessary steps to perfect its dissolution.

Ordered: 4. That the New-Mac

Electric Cooperative, Inc., a coöperative corporation, shall prior to the effective date of this order file proof with this Commission of the compliance by it with the above condition provided in *"Ordered:* 1." by its said conversion into a coöperative, under the provisions of § 5402, Rev Stats of Missouri, 1939, as above required.

Ordered: 5. That this order shall take effect thirty days from this date, and that the secretary of the Commission shall forthwith serve on all parties interested herein a certified copy of this report and order and that the applicant and all other interested parties shall notify the Commission before the effective date of this report and order in the manner prescribed by § 5601, Rev Stats Missouri, 1939, whether the terms of this order are accepted and will be obeyed.

Commissioner Wilson dissents in separate opinion.

WILSON, Commissioner, dissenting: I cannot agree with the majority opinion. It is my opinion that the proposed transfer is detrimental to the public interest and contrary to the public welfare.

The effect of the majority opinion is to repudiate the previous decision of this Commission of March 28, 1934, in the case of Public Service Commission v. Missouri Southern Pub. Service Co. 21 Mo PSCR 86, 6 PUR(NS) 269, a proceeding instituted by the Public Service Commission of Missouri to determine the present fair value of the property of said company, as well as to ignore other records of this Commission and the testimony of the Commission's accountant, Mr. William C. Ross. In said case, which was instituted by this Commission upon its own motion on December 9, 1929, the Commission found as facts the following:

"The Missouri Southern Public Service Company does not have any generating equipment, but purchases its power from the Empire District Electric Company near Cassville, Missouri. The property of this company consists of electric distribution systems in the towns of Cassville, Exeter, Washburn, Seligman, Wheaton, and Rocky Comfort. Those towns, except Rocky Comfort, are interconnected by a 11,500-volt transmission line. Rocky Comfort is connected to the transmission line by a 2,300-volt line." 21 Mo PSCR at p. 92.

At the hearing of the present case Mr. S. C. McMeekin, president of Missouri Southern Public Service Company, admitted that this finding of fact described the facilities and the location of the area served and that there has been no substantial change. The order in the case referred to contained the following:

"Now, upon the evidence in this case and after due consideration, it is

"Ordered: 1. That the Commission finds as a fact that the present fair value of the property of the Missouri Southern Public Service Company used and useful in the public service as of June 30, 1932, is the sum of $95,000." Since there has been no substantial change in the facilities since that time it appears that there should be no great change in the value of the property other than the additions.

In making this finding the Commission had before it the appraisal of the

Commission engineers, the appraisal by Mr. Edward J. Cheney of New York, and the company records.

In determining the estimated value of a utility property the method in common use according to the testimony of our Commission accountant, William C. Ross, is to take the latest finding of value which the Commission has made and add to that amount the gross additions and deduct therefrom the gross retirements since that date.

The engineers found an estimated investment in the property as of December 31, 1929, in the sum of $82,493. Net additions of $50,059.76, as shown by the annual reports of the company since 1929, when added to the $82,493, estimated investment found by the Commission engineers, results in an investment as of December 31, 1942, of $132,552.76.

The witness who presented this testimony later testified that an adjustment of retirements during the period since 1929 should be made and estimated this amount to be $10,122.80, which would increase the estimated investment at December 31, 1942, to $142,674. Reducing this to the estimated 82½ per cent condition, which was the approximate condition of the property according to the testimony of the president of the company, would give a depreciated value of $117,706. This figure contrasts unfavorably with the net depreciated book value of $183,716.08 which is used in the majority opinion. The amount of $183,716.08 is predicated upon a book value in 1930 of $156,054.88 to which net additions since that date have been added.

In commenting on the book value of $156,054.88, the Commission stated: "We again note in passing that we have given no consideration to the book investment figures of $156,054 for the Missouri Southern Public Service Company." 21 Mo PSCR at p. 158.

In 21 Mo PSCR at p. 145, the reason no consideration was given to this figure is stated as follows: "This Commission has always given consideration to the investment in a property under its consideration when determining the fair value of that property for rate-making purposes. We do not, however, interpret the term 'Investment Cost,' as the book value of the property nor as the total historical cost, and in this case we can give no consideration whatever to the investment recorded in the books of the companies. These recorded investment accounts, as shown, *supra,* are composed, in large part, of excessive purchase prices paid for operating utilities, and include many erroneous items. If the utilities desire to pay prices for operating utility properties far in excess of their real values, as is the case here, they must bear the consequences. They will not be permitted to charge rates to the consuming public designed to yield a return upon such excessive prices. This is inflation in one of its most vicious forms."

It is on this type of recorded book value that the majority has relied for its estimate.

The evidence disclosed that the amount recorded upon the books of seller did not purport to represent the cost of the property, but was merely a recording of an estimate of cost of reproduction which was made by an engineer employed by the company to

which were added overheads computed on the basis of percentages allowed by a Federal court in the state of New York in a case which had no relation to the seller, and no evidence was presented to show that conditions were at all similar. (See Brooklyn Borough Gas Co. v. Prendergast, PUR1927A 200, 16 F(2d) 615.) Valuations of property for purposes of sale are not generally accepted by this Commission when based upon such obviously unreliable records.

The Commission found the cost of reproduction as of December 31, 1929, to be $92,750. Adding the net additions since then, the cost of reproduction, as of December 31, 1942, would be $142,809.76. Taking 82½ per cent of that sum to reflect the present conditions, the value would be $117,817.75.

Based upon estimated investment or on estimated reproduction cost a value in excess of $118,000 could not be justified; yet this property is to be sold for $170,000 and is to be the security upon which a loan in excess of that amount, namely, $181,000 is to be obtained from the Rural Electrification Administration of the United States government.

It is the duty of this Commission in passing upon the proposed transfer to examine the financial aspects of the transaction in order to determine whether the consumers and prospective consumers may reasonably expect adequate service and reasonable rates. In the exercise of its discretion the Commission must proceed pro bono publico to determine whether or not the purchaser is in all respects competent and able on the long run view to furnish and provide safe and adequate, just and reasonable, facilities and to continue on a permanent and dependable basis to render the service now being rendered by the vendor at just and reasonable rates.

Cassville, a town of 1,201 population, is the largest town served by Missouri Southern Public Service Company. It serves about 150 farm customers. The farthest line is to Roaring River State Park, a distance of about 8 miles from Cassville. The testimony shows that 75 per cent of the rural customers of this utility are within a radius of about 3 miles of the incorporated towns served in Barry county. Mr. Dopp, superintendent of Missouri Southern, stated that there was an unserved rural area near Cassville, but refused to say it would be profitable to construct lines and serve the area.

Mr. C. L. Langley, manager of New-Mac, testified there are 2,500 unserved farms in Barry county and that it would be the purpose of New-Mac if this transfer is approved to proceed to electrify and furnish energy to those farms as soon as possible with the materials available. Applicants' Exhibit G, which was prepared by Mr. Langley, was introduced in evidence. This is a combined projected operating statement from July 1, 1943, to July 1, 1944. The figure of $108,140.48 is Mr. Langley's estimate of the total operating revenue of the facilities proposed to be acquired and the present facilities of New-Mac. The total operating revenue for Missouri Southern the preceding year, according to Mr. Langley, was $57,864, while the total operating revenue of New-Mac was $45,302 or a total of $103,166.

Mr. Langley explained that the estimated revenue for the combined operations was about $5,000 more for the

two companies than in the preceding year because of the possible 300 or 400 customers that he said they expected to connect during the next twelve months. This would be an increase in the number of customers of approximately 20 to 25 per cent. When asked upon cross-examination whether this increase was computed upon New-Mac's schedule of rates or Missouri Southern Public Service schedule Mr. Langley stated that he had used the New-Mac farm rate. It was pointed out that the farm rate of New-Mac to domestic consumers is higher than the present rate of Missouri Southern Public Service while the commercial rate of New-Mac on its present five schedules is considerably lower than the commercial rate of Missouri Southern Public Service now on file although under the terms of the contract involved New-Mac is bound to offer to the consumers and to the Missouri Southern Public Service commercial users their choice of this rate. The evidence touching this exhibit is confusing, but this question was asked of Mr. Langley:

Q. You didn't decrease the amount of revenues by the lower rate that will be offered to them if this contract is put into effect, you didn't do that? and this answer was given:

A. I don't recall that I did. I didn't take that into consideration at all.

It is evident from the testimony that not only is the estimate of increased revenue to be derived from the additional customers high, but also that the present revenue of New-Mac for purposes of estimating future revenues should be reduced by the amount which would result from the exercise by the present customers of New-Mac of the option to adopt the lower rates now offered by Missouri Southern Public Service; and the present revenues of Missouri Southern Public Service for purposes of estimating future revenues should be reduced by the amount which would result from the adoption by present customers of that company of the lower rates New-Mac now offers. In addition to the doubt as to the accuracy of the $5,000 increase in revenue to be derived from the customers there is also evidence to support the conclusion that the present revenues should be reduced by some considerable amount to offset the reduction which will result from the use of the lowest rates in all cases.

Mr. Langley testified the coöperative expected to add 500 new customers at an expense of approximately $200 per customer. The assuming of such great debt obligations with only the most speculative plans for increasing revenues to meet them appears unsound to me. The picture is not such as to assure us of adequate and certain service at reasonable rates to the consumer. It is rather to be expected that if anything at all goes wrong rates will be increased and the service impaired.

Counsel for the Commission questioned Mr. Langley at length in an effort to develop the fact that New-Mac would be able to meet the service upon its debt at the time when it would be required to make the complete payments provided in the mortgage after the expiration of the period when no interest is required to be paid and no payment upon the principal required, which Mr. Langley testified would be at about the forty-ninth month. This

testimony disclosed that on one note the amount of such payment would be $5.34 per thousand per month on $299,000 and $5.35 per thousand per month on $151,000. Mr. Langley also testified that the interest and payment upon the principal of the third note in the amount of $181,000 would be $5.34 per thousand per month. This evidence shows that after the expiration of a period, which the testimony suggested would be eighty-four months, New-Mac would be faced with the payment of more than $40,000 per year upon the three notes involved. No certain evidence was submitted to indicate that funds to meet these payments would be available.

During the cross-examination of another witness, Mr. Johnson, attorney for one of the applicants interposed this question: "It is true frequently that negotiable notes that are proper loans for sound banking are based on monthly or annual payments so that the last payment catches up all the balance and at the very time the note is negotiated all parties know there must be a refinancing, is that true?"

The reply was, "That is often the case, yes."

There was no evidence that in case of default or inability to comply with the terms of the mortgage there would be a willingness to refinance at as reasonable an interest rate. In case the condition which was suggested in this testimony develops, as seems likely, the public, which is now being served by a regulated utility whose finances and financial operations are supervised by and held within the conservative limits of this Commission's requirements, will be subject to the possibility of receiving service from a coöperative which will be compelled to accept whatever financial arrangements are offered and to pay the rates for such service as will be necessary to meet the requirements of such indefinite future financing. This is further support for my opinion that the basis for financing the acquisition is an important element to be considered by this Commission because it is of such great importance to the public interest in the territory which is to be served.

Although at the commencement of the hearing all of the interveners were permitted to intervene the majority opinion holds that under the evidence, and the opinion in the case of State ex rel. Consumers Pub. Service Co. v. Public Service Commission (April 3, 1944) — Mo —, 54 PUR(NS) ante, p. 71, 180 SW(2d) 40, the Empire District Electric Company is the only intervener which has sufficient interest to be entitled to intervene. I do not agree with this. The interveners in their intervening petition, stated their contentions in part as follows:

"(1) Interveners are engaged in the ownership, operation, development, and extension of electrical utility systems in the state of Missouri. Their systems are very largely integrated through physical interconnections. Interveners own large central generating plants at Riverton, Kansas, and Lowell, Kansas, Kansas City, Brookfield, Jefferson City, Clinton, Mexico, Cape Girardeau, and other cities in Missouri, and through interconnection contracts and physical interconnections of their lines and systems with the lines and systems of other electric utility corporations operating in Missouri, certain of the interveners obtained elec-

trical energy from the large central generating plant located at St. Louis and from hydroelectric generating plants at Keokuk, Iowa, and Bagnell dam, Lake Taneycomo, and Osceola, Missouri. Interveners, with other electric public utilities of like character, own and operate electric distribution systems, located in more than 500 cities, towns, and villages in Missouri, and in rural districts adjacent to said cities, towns, and villages. Through the interconnected generating plants and a wide spread network of electric transmission lines, the interveners, and other electric public utilities of like character, supply more than 90 per cent of all the electrical current supplied to consumers of all classes in the state of Missouri.

. . . . . .

"(9) The extension of public ownership of electrical public utility systems throughout the state of Missouri through the subterfuge of alleged rural coöperative membership acquisition, the operation of such systems under claims of privileges of immunity from regulation, of immunity from equal taxation, and a financing at cost of the Federal taxpayer, will result in destructive and unlawful competition to the interveners, the impairment of their investment in public utility systems devoted to the public service and of the efficiency and adequacy of their service to the public."

Again during the hearing counsel for interveners expressed the contention of interveners:

"I want to show this . . . that this applicant is a member of KAMO, as has been testified here by the manager. I propose to show further that it is the design of the applicant to become . . . this isn't a small transaction, Mr. Johnson, there are certain people in the United States who want to socialize the power industry, and this is the link whereby KAMO transmission line from Lake Catherine is circled to Norfolk, and this applicant is a member of this transmission company, KAMO. I say it goes to the public interest as to whether or not such a coöperative at a time when this country was at war sought at that time to promote a social program by aiding and lending assistance to the KAMO."

It appears to me that interveners, other than Empire District Electric Company, who believe their businesses to be threatened with destruction, have such an interest as would entitle them to intervene. I am convinced that there is a scheme to socialize the electrical industry in Missouri. Mr. C. L. Langley, manager of the New-Mac Electric Cooperative, Inc. admitted upon cross-examination that KAMO built a line from Lake Catherine in Arkansas to Miami, Oklahoma, and from Miami, Oklahoma it put poles in the air to a point within 2 or 3 miles of Neosho, Missouri, for the purpose of making a tie between this applicant, New-Mac Electric Coöperative, Inc., and Pensacola, the source of power. The evidence shows that the tie was forbidden by the War Production Board. Mr. Langley reluctantly admitted upon cross-examination that negotiations with the War Department for the power supply from Pensacola were made by the board of directors through the REA office in St. Louis.

On February 9, 1942, an application was filed with this Commission by KAMO Electric Cooperative, Inc., for approval of the construction of that

part of its electric transmission lines and system as extends or to be extended in the state of Missouri. On the 14th day of July, 1942, this case was dismissed without prejudice by the Commission upon request of applicant's attorney expressed in a letter to the Commission stating as the reason therefor that applicant would be prevented from building this contemplated transmission and distribution system because of lack of material. Attached to and made a part of the application in that case, No. 10,175, was Exhibit D giving plans and specifications of the proposed lines. On page 31 of said Exhibit D the following description appears:

"Said lines to be connected to the primary system of the Grand River Dam Authority at the Pensacola Substation and at the Muskogee Substation and to be located in the counties of Osage, Creek, Payne, Tulsa, Okmulgee, Muskogee, Cherokee, Sequoyah, LeFlore, Mayes, Delaware, Ottawa, Noble, and Pawnee, state of Oklahoma; the counties of Sebastine, Crawford, Franklin, Logan, Johnson, and Benton, state of Arkansas; and, the counties of Missouri,[1] McDonald, and Newton, state of Missouri, all as included within the terms of the loan contract."

Although this does not appear in the record in this case it appears in the files of this Commission.

In the "Sho-Me" Case (Re Missouri Electric Power Co. [Mo 1943]) 50 PUR(NS) 257, 271, in which all of the interveners in the present case intervened, it was said in the majority opinion:

"These utility interveners are vigorously protesting against this proposed sale, among other grounds, upon the claim that if "Sho-me" is permitted to obtain and operate these properties, it becomes (as is alleged) a step by the Rural Electrification Administration in its scheme to socialize the electric industry in Missouri as has been done in other states.

. . . . . .

"This one sale could hardly be regarded as sufficient, if any, evidence (and there is no other), to establish the existence of such alleged scheme. Apparently no such a statewide scheme could, at any future time, very readily come to fruition unless these fourteen utility interveners and perhaps others, or a major portion of them all, should, with our approval, sell their properties to a company or companies which are under the dominating influence of the REA, and unless this Commission, in each sale, should be convinced that the buyer or buyers should be granted our necessary authorization to operate the same."

But there has not been only "this one sale" to Sho-Me Power Cooperative, there have been six such applications before this Commission. There has been the approval of the sale by J. Finis Shaffer of electric properties located in the unincorporated villages of Lemons and Pollock, Missouri, situate in Putnam and Sullivan counties, respectively, to the North Central Missouri Electric Cooperative for a consideration of $9,000. There has been approval by this Commission of the sale by the Iowa Utilities Company, a corporation, of its electric transmission and distribution properties located in the villages of Lineville and Mercer, Missouri, in Mercer county

[1] Evidently a typographical error.

and immediate points to the Grundy Electric Cooperative, Inc., for the sum of $37,750 subject to the adjustments provided for by contract. There has been the approval of the sale of the electric generating plants and equipment, ice plants, and equipment, and electric transmission, distribution, and service lines and system owned and operated by the Van Buren Light Power and Ice Company located in the counties of Carter, Shannon, and Reynolds to the Black River Electric Cooperative, Inc., for a consideration of $65,000 loaned to the Black River Cooperative by the Rural Electrification Administration. There has been the approval by this Commission of the sale by O. L. Wright, owner of the Lentner Transmission Line to the Macon Electric Cooperative for the price of $1,750. This involved electric transmission and distribution properties located along U. S. Highway 36 in Shelby county, Missouri. In the Sho-Me Case, *supra,* the Commission authorized the sale of the Missouri Electric Power Company properties, including not only generating plants, transmission lines, etc., but also three ice plants and one water system, located in nineteen Missouri counties, to wit: Bollinger, Butler, Camden, Cape Girardeau, Crawford, Douglas, Franklin, Howell, Laclede, Madison, Phelps, Pulaski, Ripley, Scott, Shannon, Stoddard, Texas, Webster, and Wright to the Sho-Me Power Cooperative, Inc. for $2,500,000. In fact, the Rural Electrification Administration alloted to Sho-Me the sum of $4,275,000 for the purchase and rehabilitation of the Missouri Electric Power Company properties; and there has been the recent authorization of the sale of the Citizens Electric Company properties to the Laclede Electric Cooperative for which purchase the sum of $135,000 was borrowed from the Federal government. These purchase prices amount to a total of approximately $3,000,000, for which allotments of approximately $5,000,000 have been made, involving properties located in thirty Missouri counties and represent a sizable step in this socialization plan. These purchases cannot be justified as extensions of electrical service to rural areas for most of the consumers involved are already receiving electric service. Honorable Lyle H. Boren of Oklahoma, a member of a House Committee on Interstate Commerce which originated the REA Law, speaking in the House of Representatives on March 2, 1944 said:

"Millions of dollars, in money earmarked by Congress for the lighting up of farm homes which have not received the benefits of electricity, are being diverted from that purpose into the purchase of electric-utility systems in city areas where the customers are not only receiving electric service but which cannot be considered farm electrification."

This statement pretty generally applies to the applications determined by this Commission.

Not only are all the interveners interested parties, in my opinion, but upon a consideration of all the evidence it is my opinion that the proposal is financially unsound and that the transfer would be detrimental to the public interest and contrary to the public welfare. For these reasons I respectfully dissent from the majority opinion.

MISSOURI PUBLIC SERVICE COMMISSION

Re Continental Gas & Electric Corporation et al.

Case No. 10,440
May 31, 1944

APPLICATIONS *for approval of property transfers, stock acquisitions, operating authority, corporate dissolution, and accounting entries; granted in part.*

Depreciation, § 51 — Electric property.

1. A depreciation allowance of 3.11 per cent of the original cost of depreciable electric property was approved, p. 109.

Depreciation, § 56 — Gas property.

2. A depreciation allowance of 2.03 per cent of original cost of depreciable gas property was approved, p. 109.

Depreciation, § 60 — Heating property.

3. A depreciation allowance of 2.52 per cent of original cost of depreciable heating property was approved, p. 109.

Depreciation, § 82 — Waterworks.

4. A depreciation allowance of 1.55 per cent of original cost of depreciable water utility property was approved, p. 109.

Expenses, § 37 — Amortization of plant acquisition cost.

5. The public should not be required to bear the expense of amortization of the difference between the purchase price of electric property and its original cost, where the purchase price exceeded its valuation determined on the basis of reproduction cost depreciated and the only way the purchaser could expect to earn a fair return upon its investment would be for the Commission to allow a return based upon an amount substantially in excess of original cost and reproduction cost depreciated, p. 110.

Accounting, § 32 — Plant acquisition cost — Amortization.

6. A public utility company should not be authorized to amortize the amount in Account 100.5, Electric Plant Acquisition Adjustments, by charges to Operating Income, Account 505, Amortization of Electric Plant Acquisition Adjustments, but should be required to amortize such amount by charges to Other Income, Account 537, Miscellaneous Amortization, where properties have been purchased at amounts in excess of original cost and the only way such excess cost could be excepted to earn a fair return would be by the continued acquiescence by the Commission in rates based upon purchase prices substantially in excess of cost of the property when constructed, and notwithstanding conjectural economies, p. 110.

By the COMMISSION: This case is before the Commission upon an application filed March 28, 1944, by Continental Gas & Electric Corporation, Missouri Power & Light Company, and Maryville Electric Light and Power Company,

Continental Gas & Electric Corporation (herein sometimes referred to as Continental) is a Delaware corporation owning, among other things, all the securities and open account indebtedness of Maryville. Continental is not a gas, electrical, water, or street railroad corporation within the meaning of § 5651 (2), Rev Stats Mo 1939. Its principal office is at 105 West Adams street, Chicago, Illinois.

Missouri Power & Light Company (herein sometimes referred to as Missouri) is a Missouri corporation owning electric, gas, heat, water, and ice properties in 30 counties in the state of Missouri, and is a gas, electrical, and water corporation within the meaning of § 5651 (2), Rev Stats Mo 1939. Its principal office is at Jefferson City, Missouri.

Maryville Electric Light and Power Company (herein sometimes referred to as Maryville) is a Missouri corporation owning and operating electric, gas, and heat utility assets in the city of Maryville, Missouri, and in surrounding territories in Atchison, Andrew, DeKalb, Gentry, Nodaway, and Worth counties in Missouri, and is a gas and electrical corporation within the meaning of § 5651 (2), Rev Stats Mo 1939. Its principal office is at 144 South 12th street, Lincoln, Nebraska.

The application states that Continental and Maryville are subsidiaries of United Light and Power Company, a registered holding company under the Public Utility Holding Company Act of 1935, which is the top holding company in the system. In conformity with the general policy of the United Light and Power Company to create an integrated public utility system as defined in said act, Continental entered into an agreement dated January 14, 1944, to purchase from North American Light & Power Company all the shares of Missouri common stock consisting of 75,000 shares without par value and having a stated value of $3,300,000 and 3,298 shares of $6 cumulative preferred stock without par value having a stated value of $100 per share for the total sum of $3,729,800.

Upon consummation of the purchase of Missouri securities as hereinbefore stated, Continental proposes to sell all of the outstanding securities and open account indebtedness of Maryville, which it owns, to Missouri for the sum of $1,271,288.80. Said securities and open account indebtedness of Maryville are as follows:

4,000 shares of capital stock, par value $100 per share	$400,000.00
6% demand note, principal amount	328,719.84
Open account indebtedness	542,568.96
Total	$1,271,288.80

Missouri proposes to pay for the securities and open account indebtedness of Maryville by using excess cash and United States Treasury obligations which it owns.

On acquiring the securities and indebtedness of Maryville, as hereinbefore described, Missouri proposes to cause Maryville to be liquidated and dissolved, thereby acquiring properties, franchises, and assets of Mary-

ville and surrendering to Maryville the securities and open account indebtedness of said company owned by Missouri. In addition, Missouri proposes to assume all liabilities of Maryville, then remaining outstanding, and to carry on the business now carried on by Maryville at rates and schedules now on file with the Commission.

On completion of the transactions proposed and herein described, Missouri proposes to redeem 10,000 shares of its $6 cumulative preferred stock, now owned by the public, at $105 plus dividends accrued and unpaid thereon to the date of redemption. The preferred stock is redeemable in whole or in part on any dividend payment on thirty days' written notice. It is expected that the proposed partial redemption of preferred stock will be made on July 1, 1944.

In addition to the transactions hereinbefore described, applicants propose to make certain adjustments in the plant account of Missouri in connection with the proposed transaction. Plant Adjustments of Missouri in the amount of $790,458.69 are proposed to be charged to Earned Surplus. Electric Plant Acquisition Adjustments of Missouri in the amount of $1,267,763.09 will be increased by the addition thereto of Electric Plant Acquisition Adjustment of Maryville in the amount of $11,023.58 and decreased by $189,845.44 which is the amount by which the proposed purchase price of the securities and indebtedness of Maryville is less than the underlying book value of the Maryville properties. The resulting amount of Electric Plant Acquisition Adjustment will be 1,088,941.23. The applicants propose to amortize this amount over a 25-year period by annual charges of $43,557.65 to Operating Income, Account 505, Amortization of Electric Plant Acquisition Adjustments. The amounts in Plant Adjustments and Electric Plant Acquisition Adjustments are estimated and are subject to verification by the Commission and it is to be understood that these amounts herein discussed are merely approximate.

Applicants also propose to increase the Reserve for Depreciation of Missouri in the amount of $250,000 by a charge to Earned Surplus of Missouri thereby increasing said reserve at December 31, 1943, applicable to utility plant of Missouri and Maryville to $2,779,103.17.

The proposed redemption of 10,000 shares of $6 cumulative preferred stock of Missouri at $105 plus dividends accrued thereon to date of redemption will result in a charge of $50,000 to Earned Surplus.

Earned Surplus of Missouri, after acquisition of Maryville, and after giving effect to the adjustments hereinbefore described, will be $114,655.23.

The original cost of the Utility Plant of Missouri and Maryville is estimated to be $17,058,775.08 at December 31, 1943. This amount is only an estimate and is subject to verification upon completion of studies now in process at which time the Commission will make a finding of original cost.

The applicants request authorization as follows:

1. That the Commission shall by order authorize Continental to acquire from North American Light &

Power Company all the shares of common stock and 3,298 shares of $6 cumulative preferred stock of Missouri as set forth in paragraph IV and in accordance with the agreement dated January 14, 1944, Exhibit 1.

2. That the Commission shall by order authorize Missouri to acquire from Continental, and Continental to transfer to Missouri, all the securities and open account indebtedness of Maryville as set forth in paragraph V for the sum of $1,271,288.80.

3. That the Commission shall by order authorize Maryville to transfer to Missouri all the business, property, franchises and assets of Maryville in complete liquidation of Maryville.

4. That the Commission shall by order authorize Missouri to acquire all of the business, property, franchises, and assets of Maryville and in connection therewith to surrender to Maryville all the securities and open account indebtedness of Maryville owned by Missouri, and authorize Missouri to assume any other liabilities of Maryville then remaining outstanding.

5. That the Commission shall issue a certificate of public convenience and necessity to Missouri to construct, reconstruct, and maintain electric and gas properties in the cities, towns, and villages in the counties of Gentry, Nodaway, and Worth, in the state of Missouri, and in said counties outside the limits of municipalities, and to operate such properties under rates and schedules now on file, as now operated or authorized to be operated by Maryville, and to exercise all rights and privileges under franchises granted to Maryville and to be transferred to Missouri as in this application set forth.

6. That the Commission shall by order authorize Maryville, on the transfer of its business, property, franchises, and assets to Missouri as aforesaid to cease to operate as a public utility and to dissolve.

7. That the Commission shall by order authorize Missouri to amortize the amount of $1,088,941.23 of Plant Acquisition Adjustments over a 25-year period by annual charges of $43,567.56 to Account 505, Amortization of Plant Acquisition Adjustments, Uniform System of Accounts.

8. For such other and further order of the Commission as may be found necessary to effectuate the transactions proposed in this application.

The authorizations requested will be hereinafter referred to by numbers as shown above.

A hearing was held upon this application on April 7th at which time testimony in support of the application was submitted. No one appeared in opposition to the authorizations requested and the case was submitted on the record. On April 17th, an application to reopen the case was filed with the Commission by the applicants for the purpose of receiving new and additional evidence and on April 18th the case was reopened for the presentation of additional evidence and set for hearing on April 21st. This hearing was later postponed and set for hearing on May 5th. On May 5th another hearing was held at which applicants submitted further evidence and testimony and the original application was amended and the request was made "that the Commis-

sion shall by order authorize Missouri to amortize the amount of $1,088,941.23 of Plant Acquisition Adjustment over a 25-year period by annual charges of $43,567.56 to Account 505, Amortization of Plant Acquisition Adjustments." At this hearing no one appeared in opposition to the authorization and the case was again submitted on the record.

In the hearing on April 7th, testimony was presented in regard to the depreciation charges which were proposed to be made upon consummation of the sale and purchase, and the questions of the adequacy of the depreciation reserve and of the adequacy of annual provisions proposed to be made, were discussed. Witnesses for the applicants stated that the depreciation reserve which would result from the combination of the reserves of Missouri and Maryville and the transfer of $250,000 from Surplus to Reserve for Depreciation, would be adequate and was reasonably required for the protection of the investment in the property. The reserve which would result from this combination and transfer from Surplus was shown to be $2,779,103.17 which is the amount Missouri proposes to record on its books upon consummation of the purchase.

[1-4] Further testimony was submitted regarding annual depreciation expenses which were proposed to be set up on the books of Missouri after acquisition of Maryville. The pro forma income statement which was submitted as Exhibit 12 shows the annual provision for depreciation will be $477,653. Witnesses testified that this amount was ample to cover the currently accruing depreciation, that the amount was arrived at by engineering studies and was required to cover the annual loss due to depreciation. The Commission is desirous that proper provisions be made to cover the currently accruing depreciation so that the property may be amply protected and the standard of service to the public maintained. Upon request by the Commission, Missouri has furnished a statement showing the percentages used by it in arriving at the amount of $477,653, which percentages are shown by the various utility departments. Of this amount $7,780 pertains to the ice department and as this department is not subject to the jurisdiction of this Commission it will be excluded in our findings. We are of the opinion that Missouri should be required to charge the operating expenses of the various utility departments annually with the amount of $469,873 which amount shall be credited to the Depreciation Reserve of the company. This amount is based upon annual accruals by departments as follows:

Departments	Per Cent Original Cost of Depreciable Property
Electric	3.11
Gas	2.03
Heating	2.52
Water	1.55

After careful consideration of the evidence and investigation by the staff the Commission is of the opinion that a Reserve for Depreciation in the amount of $2,779,103.17 is reasonably required for the proper protection of the property as at December 31, 1943, and that the rates proposed to be used for annual accruals in Depreciation Reserve are adequate and

proper for the purpose and it will so order.

The Commission has considered the evidence in support of applicant's requests Nos. 1, 2, 3, 4, 5, and 6, and is of the opinion that these authorizations should be granted and it will be so ordered.

[5, 6] With regard to request No. 7, "that the Commission shall by order authorize Missouri to amortize the amount of $1,088,941.23 of Plant Acquisition Adjustments over a 25-year period by annual charges of $43,567.56 to Account 505, Amortization of Plant Acquisition Adjustment," there was much testimony. The applicants claimed that the amortization of the amount in Electric Plant Acquisition Adjustment Account, which they estimated to be $1,088,941.23, by annual charges of $43,567.56 to Operating Income, Account 505, Amortization of Electric Plant Acquisition Adjustments, over a 25-year period, was justified by the many benefits which would accrue to the consumers as a result of the proposed acquisition. They submitted testimony regarding savings and economies which would be made. These economies consist of changes in the administrative organization of Missouri, changes in customer accounting and billing and in meter reading and collections. It was also proposed that present storeroom procedure and methods of accounting and handling be revised. Handling of meter sets, service, and trouble costs and appliance adjustments, are suggested to lack coördination and to be unduly complex and it is suggested these practices may be beneficially changed. It is planned to reduce the present six districts of Missouri and to substitute, therefor, three new operating divisions. These savings are summarized in Exhibit No. 16 and are estimated to amount to $187,800 annually.

Nothing is included in the exhibit, nor was any evidence presented, showing that these savings can only be made as a result of the acquisition of Maryville by Missouri or the acquisition of Missouri stock by Continental. The savings which have been discussed herein and in greater detail in Exhibit 16, with the exception of those incident to the acquisition of Maryville, are savings which are available to any prudent management and most of them could be made as well by Missouri under the present ownership.

The savings which it is estimated may be made by the proposed purchase of power from the Kansas City Power and Light Company amount to $131,900.

Applicants' witness contended that the application before the Commission is desirable from the standpoint of development by Continental of an integrated public utility system in the north Missouri and south Iowa region, that such development will result in benefits to the users of the utility services which Missouri Power & Light Company furnishes, that such benefits will be found in lower power costs and will also provide more dependable and efficient service.

The total estimated power savings as shown on page 32 of Exhibit 15 is $131,900 for both Missouri Power & Light and Maryville Electric Light and Power Companies.

The plan of producing this saving

in so far as it relates to Missouri Power & Light is as follows:

The present Missouri Power & Light Company supplies its energy requirements in part by its own generating facilities and in part by purchased power. The company operates a total of seven electric generating stations comprising a total capacity of 33,800 kilowatts. These stations are located at Jefferson City, Brookfield, Kirksville, Mexico, Moberly, Boonville, and Excelsior Springs. The generating equipment in the first three stations, namely, Jefferson City, Brookfield, and Kirksville, consists for the most part of modernly designed units of relatively high efficiency and economy of operation. The other stations are high cost and at present are operated only during the peak load or for standby.

In addition to these steam generating stations, the company owns and operates, for standby and emergency, four small Diesel oil engine plants at Edina, La Grange, Clarence, and Maysville. These oil engine stations have a capacity of only 540 kilowatts.

For the year 1943 the company purchased approximately 24,000,000 kilowatt hours of electric energy, or a total of 15 per cent of its requirements, from Mississippi River Power Company, the Kansas City Power & Light Company, the Missouri Public Service Corporation, the Iowa Union Electric Company, and the Missouri Edison Company.

This cost of power averaged 1.024 cents per kilowatt hour at the various delivery points. The Mississippi River Power Company furnished approximately 50 per cent of the total power purchased at an average cost of 1.058 cents per kilowatt hour. Approximately 7,700,000 kilowatt hours were purchased from Kansas City Power & Light Company at 8.45 mills per kilowatt hour. This was the cheapest power purchased. The present total system peak load of the Missouri Power & Light Company is approximately 30,000 kilowatts.

According to applicants' witness the situation as above presented, particularly with respect to high power costs now obtaining for certain operating and purchased power, makes it desirable that a cheaper over-all source of supply be obtained.

The applicants have analyzed the electric production costs at Kansas City stations of the Kansas City Power & Light Company and found an average net cost of electric energy for the year 1943 to be 3.55 mills per kilowatt hour, exclusive of fixed charges. This cost is at the switchboard of the Kansas City stations. A cost of 3.55 mills is 41 per cent less than the corresponding over-all generating expenses of the Missouri Power & Light Company and 23 per cent less than the most favorable individual generating station of the Missouri Power & Light Company, at Brookfield.

The applicants' witness testified that the demands for electric energy in the Kansas City area have greatly increased in the last year or two and that war industry demands may not as yet have reached their maximum, but that, at the present time, system peak loads of the Kansas City Power & Light Company are from twenty-five to thirty thousand kilowatts higher than previously estimated under normal expected demands. Accordingly, the present direct "on peak"

war loads have been estimated at from twenty-five to thirty thousand kilowatts or approximately the equivalent of the Missouri Power & Light Company load.

The applicants contend that, at the close of the war, the direct loss of load caused by the closing down of war industries, together with the indirect loss of load caused by the cessation of war efforts, should make it possible for the Kansas City Power & Light Company to very readily take on the load of the Missouri Power & Light Company on a dump power basis.

In addition it was pointed out that the Kansas City Power & Light Company owns a power site on the Missouri river at Glasgow, approximately 100 miles east of Kansas City, that it also owns a large tract of coal land within close proximity of the power site at Glasgow, and that the power site is within 15 miles of Boonville, one of the principal towns of the Missouri Power & Light Company.

It is the belief of the applicants' management that, with the growth of the load of the Kansas City Power & Light Company, the most logical location for the development of additional power facilities would be at Glasgow, and that such development would be for base load operations. When this development is made it would be necessary to build a high-tension line from the power production facilities in Kansas City to the Glasgow station and, while at present such a project could not produce energy in competition with the Kansas City station costs, it is believed by the applicants' management that the Glasgow station's possibilities recommend tying it with any projected high voltage line of an integrated electric system.

The applicants suggest that the following facilities should be constructed in order to serve the principal Missouri Power & Light load out of Kansas City:

1. 138-kv. transmission lines from Kansas City to Glasgow, 97 miles.

2. 66-kv. transmission line (designed for future 138-kv. operation) from Glasgow to Edina, 78 miles.

3. Reconstruction of existing 33-kv. lines from Moberly to Macon, for 66-kv. operation, 24 miles.

4. 66-kv. transmission line from Glasgow to Jefferson City; via Boonville, 64 miles.

The applicants propose that the Kansas City Power & Light Company deliver 27,000 kilowatts to Missouri Power & Light Company at Glasgow and that the power be purchased from Kansas City on a dump power basis. It is suggested that the Missouri Power & Light Company will reserve its more modern stations at Jefferson City, Kirksville, and Brookfield, totaling 25,700 kilowatts in capacity, for standby, and that the present firm power contract between the Kansas City Power & Light Company and the Missouri Power & Light Company for Excelsior Springs should continue.

Because of anticipated importance of the Kansas City to Glasgow transmission line to the Kansas City Power & Light Company, and to the United Light and Power properties, which may, in the future, be connected to this line, it was assumed by the applicants that the portion of the line attributable to the serving of Mis-

souri Power & Light Company should not involve more than 50 per cent of the investment in transmission and substation facilities between Kansas City and Glasgow. In making the estimate of savings the applicants allocated the annual fixed charges on 50 per cent of the investment to the Missouri Power & Light Company.

It was assumed that the proposed line from Glasgow to Edina, via Macon, will also eventually become a link in the 138-kilovolt transmission line facilities, and for that reason it was assumed that 50 per cent of the investment in that line should be allocated to future benefits to the Tri-Cities, Kansas City, and Burlington.

The rate which Kansas City Power & Light Company would charge Missouri Power & Light Company for "dump" or "excess" energy is included in the plan at 4 mills per kilowatt hour at station switchboards in Kansas City and is based on 1943 operating conditions, including average fuel costs, plus average maintenance costs, plus allocated fixed charges (50 per cent) on the proposed 1938 kilovolt line to Glasgow and substation facilities, plus 0.5 mills for incidentals and profits.

No allowance for additional operating expenses was included, it being assumed that no additional personnel should be necessary, particularly in supplying "dump" power.

The estimate of total savings made possible to the Missouri Power & Light Company by the proposed plan, $111,500 per year, takes into consideration fixed charges and savings in fuel on a previously authorized 5,000 kilowatt addition to the Mexico generating station. It is contended that, although this project was abandoned because of failure to obtain the necessary priority, the installation would be necessary in the future for continued operation with existing sources of supply.

The Maryville Electric Light and Power Company has recently negotiated a new contract with Iowa Power & Light Company, effective January 1, 1944, which should save the former company approximately $20,000 per year. Studies by the applicant indicate that additional savings may be made by serving the Maryville Electric Light and Power Company from a proposed Kansas City-Des Moines, 138-kilovolt transmission line. The plan proposed involves the following:

1. Closing down of steam-electric and Diesel-electric generating facilities (except for standby service) on the Maryville system.

2. Reduction of power purchases from Iowa Power & Light Company to the basis of mutual interchange of approximately equal amounts of energy.

3. Substitution of firm power supply from Kansas City Power & Light Company in place of present Maryville Company generation and purchases from Iowa Power & Light Company.

It is proposed that practically the entire supply of energy for the Maryville district be supplied by the Kansas City Power & Light Company from the proposed 138-kilovolt transmission line. The rate to be charged for firm energy has been computed in the study on the basis of existing rates in effect for the Kansas City Power & Light Company and the Missouri

Power & Light Company and is estimated at 0.685 cents per kilowatt hour. The savings in electric operations are thus estimated at $24,200 per annum, but are reduced by some $3,800 per annum because of an increase in the cost of operating the steam-heating department. The increase in the cost of operating the latter department would be brought about by the cessation of operation of the steam electric generating facilities. The net savings for power supply are estimated at $20,400 per annum.

The anticipated savings to be realized by supplying the major electric power requirements of the Missouri Power and Light Company are dependent upon three outside factors:

1. Assurance that Kansas City Power & Light Company will have sufficient excess capacity to supply Missouri Power & Light demands without the installation of increased generating facilities.

2. The absorption of 50 per cent of the cost of high-tension transmission lines from Kansas City to Glasgow and from Glasgow to Edina, by Kansas City Power & Light or other branches of the proposed integrated power system.

3. A rate for energy of four mills for 157,500,000 kilowatt hours of energy to be purchased by the Missouri Power & Light system.

There is no doubt that the construction of the transmission line from Kansas City to Glasgow and the additional lines from Glasgow to Edina and from Glasgow to Jefferson City would strengthen the transmission facilities of the system and would also afford a much more satisfactory power supply than is now available. In fact the company would have available an unusually large amount of standby facilities. As indicated in applicant's Exhibit No. 15, the time may come when Kansas City will require additional capacity and when that capacity is required it does not seem reasonable to suppose that Kansas City would be in a position to supply Missouri Power & Light Company on a "dump" basis. It seems reasonable to assume that, unless the power furnished is bona fide "dump" power, each load should pay its proportionate part of the return, depreciation, and taxes on the fixed property involved. This is not contemplated in the proposed power plan.

A steam generating plant of sufficient capacity to carry the Missouri Power & Light Company load would probably cost $3,600,000. Return, depreciation, and taxes on only a reasonable proportion of the plant capacity required to deliver the Missouri Power & Light Company demand would absorb the $111,000 estimated annual savings. Obviously, the savings in purchased power can be made only by requiring consumers at Kansas City to pay fixed charges on investment used in serving Missouri Power & Light Company.

Other possible economies are discussed. These economies also are of such a nature that they could be accomplished by the present management and are in no way contingent upon a change in ownership.

Exhibit No. 18, which was submitted, shows an analysis of the amounts which comprised the estimated balance in Account 100.5, Electric Plant Acquisition Adjustments. A

witness discussed the acquisition of the plant and distribution system at Madison and the evolution of electrical service in that town at considerable length. By cross-examination it was shown that a substantial part of this evolution was merely a reflection of the evolution in the electrical industry throughout the country and especially in the small towns, and that the benefits which accrued to Madison were at the same time accruing to other small municipalities as a result of the development of the electrical industry and the appliances related thereto. In the case of Madison, which was the example chosen by this witness, Exhibit 18 shows the original cost to have been $13,847. Missouri paid $24,890 for this property and the amount which resulted in Electric Plant Acquisition Adjustment Account pertaining thereto was $11,043. According to this same witness, engineers of this Commission made a valuation of the property at Madison shortly thereafter and found "something like $18,000." The purchase price in this case was apparently $6,800 more than the valuation determined on the basis of Reproduction Cost Depreciated. It is evident that the only way Missouri could expect to earn a fair return upon its investment in this particular case would be for this Commission to allow a return, based upon an amount almost double the original cost and more than one-third higher than Reproduction Cost Depreciated. It does not seem logical or fair that the public should be required to bear the expense of amortization of the difference between the purchase price and the original cost of this property.

Madison was the only example which was discussed in this connection, but a study of Exhibit 18 shows that in the purchase of property having an estimated original cost of $5,120,807, $1,267,763 in excess of said original cost, was paid by Missouri. The only way such excess cost could be expected to earn a fair return would be by the continued acquiescence, by this Commission, in rates based upon purchase prices approximately 25 per cent in excess of the costs of the property when constructed. These properties were acquired in the period from January, 1924, to January, 1944, and have been carried upon the books at something other than original cost during the entire period since acquisition, and the excess over original cost has undoubtedly had an important part in sustaining earnings which, upon the basis of original cost, would have been excessive and would have justified rate decreases. The public to that extent has paid to the owners some portion of the excess over original cost. The suggestion that economies which are expected to be accomplished upon acquisition of the stock of Missouri by Continental and the consummation of the purchase of Maryville by Missouri, will justify the assessing of $43,000 per year for twenty-five years against the consumer, was questioned in the hearing. Witnesses were questioned in regard to the benefit to the consumers which would result from the estimated $300,000 a year economy. No witness stated that the economies, as they were accomplished, would be passed to the consumer through the medium of rate reductions but under the plan for amortiza-

tion proposed by the applicants the entire amortization cost, which was estimated by the applicants to be in excess of $1,088,000, would certainly be passed to the consumers. Mr. Randolph, general counsel for the Commission, in his examination of a witness, tried in vain to obtain valid reasons why the entire risk of deriving possible benefits from future savings should be borne by the consumers instead of the owners of the property.

The economies, which will result if the power plan which was submitted is consummated, are subject to the many conditions which we have discussed herein. These economies are all to be accomplished in the future and must necessarily be subject to the conditions which will prevail at that future date. They are not certain and the amount of such savings is largely a matter of conjecture.

We are of the opinion that the acquisition of the stock of Missouri by Continental and the acquisition of the properties of Maryville by Missouri are not detrimental to the public interest and should be approved, but we cannot agree that the amount in Account 100.5, Electric Plant Acquisition Adjustments, should be amortized by charges to Operating Income, Account 505, Amortization of Electric Plant Acquisition Adjustments, over a 25-year period. We are of the opinion that the amount in Account 100.5, Electric Plant Acquisition Adjustments, which is estimated to be $1,088,941.23, should be amortized by charges to Other Income, Account 537, Miscellaneous Amortization, in not to exceed fifteen years and it will be so ordered.

It is, therefore,

Ordered: 1. That the Continental Gas and Electric Company, a Delaware corporation, be and it is hereby authorized to acquire from North American Light and Power Company all of the shares of Missouri Power & Light Company common stock consisting of 75,000 shares without par value and 3,298 shares of 6 per cent cumulative preferred stock of Missouri Power & Light Company, as set forth in Paragraph IV of the application and in accordance with the agreement dated January 14, 1944, which was filed as Exhibit 1 in this case, for the total amount of $3,729,800.

Ordered: 2. That Missouri Power & Light Company be and it is hereby authorized to acquire from Continental Gas and Electric Corporation all of the outstanding securities and open account indebtedness of Maryville Electric Light and Power Company for the total sum of $1,271,288.80 to be paid in cash or United States Treasury obligations. Said securities and open account indebtedness are as follows:

4,000 shares of capital stock, par value $100 per share	$400,000.00
6% demand note, principal amount	328,719.84
Open account indebtedness	542,568.96
Total	$1,271,288.80

And Continental Gas and Electric Corporation is hereby authorized to transfer said securities and open account indebtedness of Maryville Electric Light and Power Company to Missouri Power & Light Company.

Ordered: 3. That Maryville Electric Light and Power Company be and it is hereby authorized to transfer all of its business, property, franchises, and assets to Missouri Power & Light

Company in exchange for the surrender by Missouri Power and Light Company of securities, notes, and open-account indebtedness of Maryville Power and Light Company in the total amount of $1,271,288.80.

Ordered: 4. That Missouri Power & Light Company be and it is hereby authorized to acquire all of the business, property, franchises, and assets of Maryville Electric Light and Power Company and in connection therewith to surrender to Maryville Electric Light and Power Company, securities, notes, and open-account indebtedness of Maryville Electric Light and Power Company in the total amount of $1,271,288.80 and to assume any other liabilities of Maryville Electric Light and Power Company then remaining outstanding.

Ordered: 5. That Maryville Electric Light and Power Company be and it is hereby authorized to transfer its certificates of public convenience and necessity to construct, reconstruct, and maintain electric and gas properties in the cities, towns, and villages in the counties of Atchison, Andrew, DeKalb, Gentry, Nodaway, and Worth in the state of Missouri and in said counties outside the limits of municipalities, and Missouri Power & Light Company be and it is hereby authorized to receive said certificates of public convenience and necessity and to operate such electric and gas properties under rates and schedules now on file as now operated or authorized to be operated by Maryville Electric Light and Power Company and to exercise all rights and privileges under franchises granted to Maryville Electric Light and Power Company and to be transferred to Missouri Power & Light Company as hereinbefore authorized.

Ordered: 6. That Maryville Electric Light and Power Company, on transfer of its business, property, franchises, and assets to Missouri Power & Light Company, as hereinbefore authorized, be and it is hereby authorized to cease to operate as a public utility and to take the required steps to effect the dissolution of said company.

Ordered: 7. That upon consummation of the acquisition of the property, franchises, and assets of Maryville Electric Light and Power Company, by Missouri Power & Light Company, the latter company shall record upon its books the amount of $2,779,103.17 in its Depreciation Reserve accounts in the manner described in the application and shall use such amount for the purposes provided in the applicable Uniform System of Accounts and no other.

Ordered: 8. That Missouri Power & Light Company shall set aside each year from the operating revenues of its various utility departments, amounts equal to the following percentages of the original cost of the depreciable properties of said departments, namely:

Electric	3.11%
Gas	2.03%
Steam Heating	2.52%
Water	1.55%

The amounts so determined shall be credited to the Reserve for Depreciation of each said department and shall be used only for the purposes provided in the applicable Uniform System of Accounts and no other. The total amount of such anunual depreciation requirements is es-

timated to be $469,873 at December 31, 1943.

Ordered: 9. That Missouri Power & Light Company be and it is hereby authorized to amortize the amount of $1,088,941.23, which is the estimated balance which will result in Electric Plant Acquisition Adjustment Account, by annual charges to Other Income, Account 537, Miscellaneous Amortization, in a period of not more than fifteen years. The amount of $1,088,941.23 shall be adjusted upon completion of the original cost studies now in process and upon verification thereof by this Commission.

Ordered: 10. That nothing herein shall be considered as a finding by the Commission of the value for rate-making purposes or for the issuance of additional securities of the properties herein authorized to be sold or transferred, either as to the whole or as to any part thereof, nor as an acquiescence in the values placed upon said properties by said parties.

Ordered: 11. That the Commission retain jurisduction of the parties and subject matter of this proceeding for the purpose of making any orders that, to the Commission, may seem just and proper.

Ordered: 12. That this order shall take effect ten days after the date hereof and that the secretary of this Commission shall forthwith serve a copy of this order on all parties interested herein and that said interested parties be required to notify the Commission before the effective date of this order, in the manner required by § 5601, Rev Stats Mo 1939, of the Public Service Commission Law, whether the terms of this order are accepted and will be obeyed.

SECURITIES AND EXCHANGE COMMISSION

Re Federal Light & Traction Company et al.

File No. 54-87

Re Cities Service Power & Light Company et al.

File No. 59-7
Release No. 4960
March 30, 1944

HEARING *on proposed merger of holding company and affiliates and on retainability of certain properties in holding company system; proposed merger disapproved and severance of certain properties ordered.*

Intercorporate relations, § 19.3 — Integration of holding company system — Physical interconnection of properties.

1. Mere physical interconnection does not, under the Holding Company Act, result in the integration of properties, p. 123.

Intercorporate relations, § 19.3 — Integration of holding company system — Single integrated system.

2. Separate electric properties do not form part of a single integrated system, within the meaning of the Holding Company Act, where, notwithstanding their proposed physical interconnection, the evidence does not show that they will be capable of coördinated operation within the meaning of § 2(a)(29)(A) of the act, 15 USCA § 79b(a)(29)(A), p. 123.

Intercorporate relations, § 19.5 — Integration of holding company system — Additional system — Substantial economies.

3. Economies said to result from physical interconnection of electric properties are irrelevant, in determining the application of clause (A) of § 11(b)(1) of the Holding Company Act, 15 USCA § 79k(b)(1), where it does not appear that continued control by the holding company will have any effect on the procurement of such economies, p. 125.

Intercorporate relations, § 19.5 — Integration of holding company system — Other systems retainable — Substantial economies.

4. Evidence purporting to show that holding company control yields more efficient and cheaper management is of doubtful relevance in determining whether the retention of additional systems in a holding company system results in substantial economies under § 11(b)(1)(A) of the Holding Company Act, 15 USCA § 79k(b)(1)(A), p. 125.

Intercorporate relations, § 19.5 — Integration of holding company system — Additional systems retainable — Substantial economies.

5. Operating utility properties spread over three states, not shown to be coördinated or otherwise dependent upon the continuation of joint control for efficient, economical operation, may not be continued under joint control merely because certain taxes can presently be avoided by reason of the filing of consolidated tax returns, p. 125.

Intercorporate relations, § 19.8 — Integration of public utility system — Selection of principal system.

6. It is the Commission's practice in passing upon the retainability of certain properties in a public utility system not finally to preclude a choice of systems to be retained by a respondent holding company under § 11(b) of the Holding Company Act, 15 USCA § 79k(b), p. 127.

Consolidation, merger, and sale, § 24.1 — Merger of affiliated companies — Integration of holding company systems.

7. The merger of operating companies spread over three states is not necessary to effectuate compliance with § 11(b)(1) of the Holding Company Act, 15 USCA § 79k(b)(1), and not in conformance with the provisions of § 10(c) of the act, 15 USCA § 79j(c), where certain properties involved in the merger do not form part of a single system including other properties involved in the merger, and where the merger is not necessary to effectuate any operating economies claimed to result from proposed interconnections among the constituent properties, p. 127.

APPEARANCES: Lawrence S. Thorne, Clinton J. Ruch, and Eugene R. Sullivan of Frueauff, Burns & Ruch, for Federal Light & Traction Company; John D. Lyons, for the city of Tucson, Arizona; Harry O. Juliani, for the city of South Tucson, Arizona; Frank Field for the Public Utilities Division of the Commission.

By the COMMISSION: On August 17, 1943, 50 PUR(NS) 328, we issued an order in a proceeding under § 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 USCA § 79k(b)(1), regarding the holding company system of Cities Service Power & Light Company ("Power & Light") and the holding company system of its subsidiary, Federal Light & Traction Company ("Federal"), both registered holding companies (Holding Company Act Release No. 4489). That order required extensive dispositions by Power & Light and Federal. We reserved jurisdiction as to certain issues, including the retainability by Federal of its interests in The Tucson Gas Electric Light and Power Company ("Tucson"), a public utility company operating in and around Tucson, Arizona, and in Deming Ice and Electric Company ("Deming"), a public utility company operating in and around Deming, New Mexico. Both of these companies are subsidiaries of Federal.

On September 10, 1943, 50 PUR (NS) 372, we issued an order upon petitions filed for a rehearing in this matter, in which we granted leave to the parties to introduce additional evidence.[1] Thereafter hearings were held with respect to the reserved issues. At those hearings the city of Tucson appeared and filed a motion requesting that the Commission, among other things, order Federal to dispose of the Tucson Company.

On December 20, 1943, Federal filed a plan under § 11(e) of the act proposing, among other things, that Federal together with its subsidiaries operating in Arizona, New Mexico, and Colorado be merged or consolidated into the Tucson Company. On January 11, 1944, we issued our opinion and order granting in part and denying in part said motion of the city of Tucson and issued simultaneously a notice of filing and notice of and order for hearing on the plan which directed that the proceeding on the plan be consolidated with the proceding under § 11(b)(1).[2]

One of the issues recited in that order was: "Whether the proposed acquisitions of utility assets and securities by the New Company (Tucson) will tend toward the economical and efficient development of an integrated public-utility system, and whether the proposed merger or consolidation will be detrimental to the carrying out of the provisions of § 11 (b) of the act."

We also stated that such issue and "the issues relating to the retainability by Federal Light & Traction Company of its interests in The Tucson Gas Electric Light and Power Company, Deming Ice and Electric Company,

[1] The order of September 10, 1943, modified the order of August 17, 1943, by including in the reservation of jurisdiction Federal's interests in Tucson Rapid Transit Company and in utility properties of Stonewall Electric Company adjacent to Tucson properties.

[2] Holding Company Act Release No. 4832.

Tucson Rapid Transit Company, Federal Realty Company and those properties of Stonewall Electric Company which are adjacent to the properties of The Tucson Gas Electric Light and Power Company, be first considered in the consolidated hearing, and that, when the record is completed with respect thereto, such issues be submitted to the Commission for determination."

The record has been completed with respect to the retainability of the Tucson electric properties (and of those of Stonewall Electric Company which are adjacent) and the Deming electric properties together with the electric properties of The Trinidad Electric Transmission Railway & Gas Company, The Las Vegas Light and Power Company, New Mexico Power Company and Albuquerque Gas and Electric Company (and those of Stonewall Electric Company which are adjacent). The plan filed by Federal proposes the merger of all of these companies and Federal into the Tucson Company. The last four companies, namely, Trinidad, Las Vegas, New Mexico, and Albuquerque were found in our opinion of August 17, 1943, *supra*, to constitute a single integrated electric utility system retainable by Federal. These properties will sometimes hereinafter be referred to as the New Mexico properties.

Our § 11(b)(1) proceeding and the plan filed by Federal both raise substantially the same questions. In the § 11(b)(1) proceeding we must determine whether the electric properties of the Tucson and Deming companies may be retained in the same holding company system with the New Mexico properties either as a part of a single system or as a system or systems additional to such single system pursuant to Clauses (A), (B), and (C) of § 11 (b)(1). In connection with the plan filed by Federal, it is contemplated that the Tucson company will acquire the assets of the New Mexico system and Deming and thus we must make the findings required by § 10(c) of the act, 15 USCA § 79j(c).[3]

Description of the Companies Involved

Annexed hereto as Appendix 1 is a map showing the location of the New Mexico properties, the Deming property and the Tucson property, together with the related transmission lines presently existing and contemplated. [Appendix 1 omitted here.] As indicated on the map, the New Mexico properties are at present divided physically into three parts. The northern section is connected by a transmission line running from Walsenburg, Colorado, to Wagon Mound, New Mexico. The central section, located in and around Las Vegas, New Mexico, is served by a generating plant in that city physically unconnected with other system properties. The southern section, also located wholly in New Mexico, is connected by a

[3] Section 10 (c) provides in part:
". . . The Commission shall not approve—(1) an acquisition of securities or utility assets, or of any other interest, which . . . is detrimental to the carrying out of the provisions of § 11; or (2) the acquisition of securities or utility assets of a public utility or holding company unless the Commission finds that such acquisition will serve the public interest by tending towards the economical and efficient development of an integrated public utility system. . . ."
Pursuant to § 11 (e) we must find the plan "necessary to effectuate the provisions" of § 11 (b). Thus § 11 (e) raises the same issues as are raised under § 11 (b) (1).

transmission line running from Santa Fe through Albuquerque south to Belen and is served by four generating plants, located respectively at Santa Fe, Bernalillo, Albuquerque, and Belen. In our findings and opinion of August 17, 1943, *supra,* we found that these properties were capable of interconnection and coördination, and that their size and spread conformed to § 2(a)(29)(A), 15 USCA § 79b (a)(29)(A). We concluded that all of these properties constituted a single integrated system.[4]

The Deming property is presently served by a generating plant located in Deming, but takes approximately 85 per cent of its power from a transmission line of the United States Bureau of Reclamation ("USBR") running south from the Elephant Butte Reservoir on the Rio Grande through Deming. Belen, the nearest point on the transmission lines of the New Mexico properties, is approximately 125 miles north of Elephant Butte and 200 miles north of Deming. The Deming properties are not now connected with any other Federal system properties.

Tucson lies about 200 miles west of Deming. The Tucson property is served by generating plants located at Cortaro and Tucson, but takes approximately 80 per cent of its electric power from a transmission line of the USBR, running from the Parker reservoir on the Colorado river southeasterly through Phoenix to Tucson.

Annexed hereto as Appendix 2 [omitted herein] is a tabulation of certain financial and operational information with respect to the New Mexico, Deming, and Tucson properties. As there indicated, the Deming property is very small compared to each of the other two.

We here consider separately the question of whether the plan complies with the provisions of § 11(b)(1) and whether the necessary acquisitions could be approved under § 10 before we pass on other aspects of the merger.

I. The Issues under § 11(b)(1)[5]

If Federal can show that the Deming and Tucson properties form part of the single system already found to exist in New Mexico and Colorado, or if it can be shown that the Deming and Tucson properties comply with the (A), (B), (C) clauses of § 11 (b)(1) as permissible additional systems, these companies may be retained together with other Federal subsidiaries.

[4] Holding Company Act Release No. 4489, 50 PUR(NS) at p. 361.

[5] Federal insists that § 11 (b) (1) and § 10 (c) (relating to the integration aspects of acquisitions) do not apply. Its argument is based on the premise that the plan proposes the elimination of the Federal holding-company system. Although it concedes that the emerging company would remain within the system of Cities Service Power & Light Company (which owns a majority of Federal's common stock) it claims that this is of no consequence since Power & Light is under order to dispose of its interests in the Federal properties.

There is little merit to these arguments. The system is within our jurisdiction, subject to the provisions of the act, and the act must be applied to it. The contentions would not be sufficient even if accepted. We must pass on the retainability of Tucson and Deming by virtue of our prior order reserving jurisdiction; we are obligated to look to § 11 (b) (1) by the very terms of § 11 (e) under which the plan is filed; and it is frivolous to believe that a plan involving acquisitions of operating properties—*filed for the purpose of complying with the integration and simplification provisions of the act*—should not be tested by the provisions of § 10 (c) which is, in terms, applicable.

A. The Existence of a Single System

We were unable, in the main proceedings involving Federal subsidiaries to find that all the properties in Colorado, New Mexico, and Arizona constituted a single system. There has been adduced, however, new evidence of possible physical interconnection betwen the Deming and Tucson companies and the New Mexico properties. This evidence includes a letter from the USBR setting forth plans for postwar additions to its power systems in the southwest. The USBR contemplates an interconnection betwen Tucson and Deming and states that it is "also proposed to consider the feasibility of a transmission line from Elephant Butte to Albuquerque, New Mexico." The completion of all of these lines would interconnect Tucson and Deming with each other and with the remainder of Federal properties in New Mexico and Colorado.

[1, 2] Mere physical interconnection does not, under the statute, result in the integration of properties. Section 2(a)(29)(A) requires that the properties:

" . . . under normal conditions may be economically operated as a single interconnected and coördinated system confined in its operations to a single area or region, in one or more states, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation."

We cannot find from this evidence that coördinated operation of the entire claimed system is possible or will be attempted. The purpose of the interconnection betwen Tucson and Deming will be to supplement USBR output from Elephant Butte Reservoir (which lies between Deming and Albuquerque). This supplementary power will be provided from the Davis reservoir project on the Colorado river (about 250 miles northwest of Tucson). It will, incidentally, benefit the USBR by providing markets for possible surplus power from the Colorado river and make available some additional power to Deming, which now depends for most of its power upon the Elephant Butte dam.

If the program as contemplated is actually fulfilled the proposed system will be connected by an aggregate of about 850 miles of transmission line. About 375 miles of this line (all the line running from the New Mexico properties to Deming and thence to Tucson) would be out of system control. Further the lines feeding Tucson with most of its power are USBR lines from the Colorado river. If the actual system be regarded to include the Colorado river projects, an additional 250 miles of line must be considered out of system control. The ability of Tucson to interchange power with Deming is affected by the facts that the line between them is not controlled by them and that both are highly reliant upon foreign sources of power fed over foreign lines.

It should be noted also that the exact nature of the USBR proposals is not clear. The feasibility of the proposed interconnections depends upon the completion of the Davis dam. Practically all other power from the Colorado river and Elephant Butte is now committed. However, the Davis

dam project was terminated during the war and the occasion for the proposed interconnections will not arise until postwar conditions make it feasible to continue the project to completion. When this will occur cannot be known.

However, even if the lines are built they will be used primarily as an outlet for surplus power which will be provided if available from outside sources. The probability that power within the proposed system could be relayed from Federal sources to Federal markets as system economy would dictate is slight if its exists at all. As far as they affect Federal the lines will not coördinate—in the normal operational sense—the Federal properties, but will provide for certain of its properties additional sources of purchased power. We do not have before us a case in which transmission lines owned by nonaffiliated interests can feasibly serve as a vehicle for intrasystem power conveyance. The foreign ownership of the lines connecting the properties thus becomes highly relevant to the question of whether the properties are integrated.

The USBR has clearly expressed its views on the question of use of its lines as a relay vehicle between private systems. Although the bureau has in some instances contracted with customers for receipt of power from private sources, that power was pooled and made available to all customers without discrimination. It has maintained the standard policy of refusing to permit its lines to be used for wholly private interchange. In view of this clearly expressed policy the relay of power back and forth between load centers in the proposed system can hardly be contemplated as a normal procedure.

Present estimates indicate that out of a total of about 400,000 kilowatts load in the proposed system 334,000 kilowatts of firm hydro power will be contracted for with the USBR. On the basis of these estimates no more than about 66,000 kilowatts of system power remains to be freely allocated throughout system load centers. The percentage is so small as to raise a considerable degree of doubt whether the utmost freedom in transmitting this power would create a "coördinated" system. However, in view of the major probability that such interconnections as will be made will be owned by the USBR, little free sharing of the 66,000 kilowatts capacity can be expected.

It was testified on behalf of Federal that the connection of Tucson, Deming and other New Mexico properties was being considered independently of the USBR program. It is difficult to envision a rational program of interconnection among these properties without taking into account the availability of USBR surplus hydro power, but should such power be available the installation of system-owned transmission lines could be considered only if the advantages of system ownership outweighed the benefits to be received from having the USBR make the installations. It does not appear that it would be economical, in the light of these factors, to install system-owned transmission facilities.

Thus we cannot find that the Tucson and Deming companies form an integrated system together with the

remainder of Federal System properties.

B. *Tucson and Deming as Additional Systems*

[3] Federal has claimed that substantial economies within the meaning of Clause (A) of § 11(b)(1) would be lost if the Tucson and Deming properties were severed from its control. The most substantial claim in this regard depends upon the economies alleged to result from the proposed interconnections.

We have noted that the feasibility of these interconnections depends upon the availability of USBR surplus hydro power and that, should such power be available system-owned lines would hardly be feasible in view of the proposals of the USBR to construct these lines. Thus the economies which will result should the lines be installed will depend upon foreign-owned sources of power and foreign-owned transmission line. Clause (A) does not comprehend economies which could be secured without the continued retention of control. It requires a showing that: "Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system." The USBR proposals are in no way affected by the accidents of ownership of the Federal subsidiaries. In fact the bureau has stated that it deals with each of its purchase points as a separate customer notwithstanding joint ownership of these markets. The retention of control of Tucson and Deming by Federal has not been shown relevant to the procurement of the economies which would result from the proposed interconnection. We cannot, therefore consider these benefits in passing on the application of Clause (A).

[4, 5] Evidence was introduced to show that the filing of consolidated tax returns with Federal reduces the taxes payable by the Tucson and Deming companies.[6] It has also been claimed that independent operation of the Tucson and Deming companies would increase salaries and other operating expenses to compensate for the loss of the services of Federal Advisers, Inc.—the Federal system service company.

The 1942 estimate of taxes for the Tucson Company based on a single return was $505,124. Based on a consolidated return the tax was $385,087. The estimated saving was $120,037. The estimated saving for Tucson for 1943 is $126,860.

Respecting the Tucson Company it is claimed that the annual losses of economies amount to $157,472. Included in the estimated loss is the figure of $120,037 of increased taxes resulting from the inability to file a consolidated return together with Federal. Respecting the Tucson Company it has been claimed that $66,000 of additional expenses, at present alleged to be nonexistent, would be incurred upon separation. This figure includes such items as salary for a local auditor, purchasing agent, budget and tax man, statistician, additional clerks and stenographers, additional

[6] The major cause for these savings appears to be the ability of Federal subsidiaries to use Federal's relatively high income base for prior years in computing excess profits taxes.

cost of purchasing, and the like. It is estimated also that the cost of supervisory personnel would be increased if the Tucson Company were operated independently. The increase in this case is about $10,000.

There has been introduced with respect to both companies comparative evidence purporting to show that both the Deming and Tucson companies are at present more efficiently operated, in terms of ratios of administrative and general expenses to operating revenues, than comparable independent electric companies. The relevance of this evidence is doubtful. Its purport appears to be to show that holding company control (at least in Federal's case) yields more efficient and cheaper management. The argument is more properly one which should be made to Congress, which has already indicated its policy on the question of the over-all merits of holding companies.

There has been no attempt to refute the evidence submitted by Federal as to increased taxes for Deming and Tucson should they be unable to file consolidated returns with Federal. Even if we accept the estimates we do not believe that they ought to be given definitive weight. The tax "savings" resulting from consolidated returns depend upon the present state of the tax laws—which are subject to frequent change. Should the excess profits taxes be reduced, the theory of computing excess profits be changed, or the taxes eliminated, the major "savings" would disappear. We do not regard this evidence as demonstrating a continuing condition of advantage relevant to a continuation of control.

Further, although we do not doubt the business wisdom of attempting to save taxes we cannot permit tax advantages, per se, to distort the administration of the policy of the act.[7] We are not persuaded that operating properties spread over three states, not shown to be coördinated or otherwise dependent upon the continuation of joint control for efficient, economical operation, may be continued under joint control merely because certain taxes can presently be avoided. The retention of Tucson is not a close legal question which can thus be resolved. Other evidence in the case points strongly to the conclusion that control should be severed. The claim of tax savings does not outweigh that evidence.

We cannot conclude from the evidence that a separation of Tucson from Federal control would result in the loss of substantial economies within the meaning of Clause (A) of § 11(b)(1).

Certain questionable factors exist under Clause (C) of that section. Before continued control of operating systems can be permitted it must be shown that the combination:

" . . . is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation."

Clause (C) expressly enjoins us to consider the area or region affected in determining whether the continued combination would impair the stated advantages. A glance at the map

[7] See the discussion in Re Community Gas & Power Co., Holding Company Act Release No. 4915, March 2, 1944.

raises a prima facie doubt which the evidence does not resolve. The northern tip of the proposed system at Walsenburg, Colorado, is 600 miles (in a straight line) from Nogales, and many more miles distant by transmission line. The proposed system covers three states and the assets are subject to three different types of local regulation. While the act contemplates that a system may be spread into more than one state, and while we give no definitive weight to distance as such, the accumulation of negative factors persuades us that this is the type of combination which cannot be perpetuated under the act.

We will order Federal to dispose of the Tucson Company. Of course, no relation has been shown between the nonutility operations in Tucson and the New Mexico properties, and the former must also be disposed of.

However, we do not believe the same conclusion to be applicable to the Deming Company. The company is a small one, with net plant of less than $700,000 and gross income of less than $60,000 for the 12-month period ending October 31, 1943. Although we have considerable question about the accuracy and relevance of much of the evidence adduced to show that a separation of Deming from the remainder of system properties would result in the loss of substantial economies, nevertheless considerable new expenses may be incurred and considerable aid resulting from present affiliation lost. This is the type of company whose retention together with stronger operating properties we believe to be within the meaning of the act.

[6] It has been our practice, in appropriate cases, and we follow it here, not finally to preclude a choice of systems to be retained by a respondent holding company under § 11 (b). Thus, although the Tucson Company cannot be retained together with the major New Mexico properties of Federal, Federal might wish to designate the Tucson company as its principal system and elect to make appropriate dispositions of the remainder of its properties. Since active proposals have already been advanced to bring the Federal system into conformance with § 11(b)(1), we do not think it necessary to impose any set time limitation for the selection of a single system. Should Tucson be selected we will consider, at some other time, the question of whether the Deming Company may be retained with it.

II. *The Standards of § 10(c) As Applied to the Federal Plan.*

[7] Our discussion of the issues under § 11(b)(1) is pertinent to the application of § 10(c) to the Federal plan. The plan proposes that the Tucson Company acquire the securities of all Federal subsidiaries operating in New Mexico and Colorado. Under § 10(c)(1) we are required to disapprove an application for the acquisition of securities if that acquisition is "detrimental to the carrying out of the provisions of § 11." Under § 10(c)(2) we cannot approve the acquisition of utility securities unless we find "that such acquisition serves the public interest by tending towards the economical and efficient development of an integrated

public-utility system." We believe it clear from our discussion that proposed methods of operation of Federal subsidiaries do not bring them within the definition of a single integrated system. We have noted that the ownership of these companies is irrelevant to the plans of the USBR to interconnect them and to the proposed methods of operation after connection. Thus, even if we could find that the proposed interconnections created a single integrated system, it would not follow that the proposed acquisition would have any effect on future developments. We could not on the basis of the evidence already discussed approve the proposed acquisitions under § 10(c).

We would, also, have difficulty in approving the proposed acquisitions under § 10(b)(1). That section requires us to disapprove an application if we find that the proposed acquisition will tend toward "the concentration of control of public utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers." In the light of other questionable factors in the case, the spread of the proposed new company into three states becomes important. State regulation of utility companies confined within the state is, in itself, a difficult and complex problem. When, however, a single company extends into three states the regulatory problem in each of the states is considerably complicated. Rate regulation, for example, difficult at best is made more difficult. The management of a utility company can with considerable ease allocate costs and operating expenses within its system within relatively wide limits. A local state Commission which has to face the job of winnowing claimed costs and operating expenses allocated to a portion of the assets within its state faces a difficult task indeed. Although that kind of complication of regulation is sometimes inevitable, we do not believe it should be permitted when evidence of compliance with other provisions of the act is highly doubtful.

We do not express disapproval of the fundamental provisions of the plan to merge Federal with its subsidiaries, eliminate Federal's preferred stock and Federal itself. Our determination is limited to a finding that the Tucson Company cannot, consistently with the provisions of the act, be merged with the other companies. We believe it appropriate that Federal consider a continuation of the proceedings on the basis of an amended plan which will limit the proposal to the companies forming part of its retainable system.

An appropriate order will issue.

Industrial Progress

Selected information about products, supplies and services offered by manufacturers. Also announcements of new literature and changes in personnel.

General Electric to Make Two Models of Irons

Two models of electric irons will be manufactured by the General Electric Company in its Ontario, California, plant under recent OPA and WPB rulings and directive orders, it was announced recently by M. B. Ross, sales manager of the company's traffic appliance divisions.

Both models will be of the automatic type. The majority of the 421,000 irons, which was the quota granted G-E, will carry a retail price of $8.55, including tax. The other model will retail at $5.70, including tax. These prices are comparable to those of prewar models.

Mr. Ross emphasized that both models will be of prewar quality. He said the new irons will be similar to the prewar irons manufactured by G-E with only minor modifications in the external finish.

It is expected that delivery of the irons will begin in September. General Electric's regular distributors will receive the first shipment, and retailers will be able to offer the irons for sale to the general public shortly afterward.

Quotas have been established for each geographical area within the United States, based on the distribution of iron sales of 1940, adjusted to compensate for population shifts since that year.

Reëmployment Program Announced

A program for the reëmployment of war veterans, developed in coöperation with the apprentice training services of the War Manpower Commission for use as a pattern to be followed in veteran training and rehabilitation, has been announced by the American Optical Company which has sent over 3,000 former employees into the service.

Primarily developed to rehabilitate disabled veterans and to select for more responsible positions those men with brilliant military records, the program was fostered by a committee of WMC agencies with William F. Patterson, director of the apprentice training services, acting as chairman.

Elliott Bulletin

ELLIOTT mechanical drive turbines, type CY, with built-in reduction gearing—never previously described in Elliott Company publications—are discussed in a new 4-page, 2-color bulletin, H-15.

The single-stage mechanical drive turbine with built-in reduction gear combines the standard Elliott CY turbine with a specially built vertically-offset gear. This combination eliminates the turbine exhaust-end bearing and coupling by supporting the combined turbine and pinion shaft on three sleeve type bearings. Rugged, self-contained, and compact, the mechanism saves space and initial cost.

Line drawings and photographs illustrate the descriptive copy in Bulletin H-15, which is available upon request to the steam turbine department, Elliott Company, Jeannette, Pa.

Westinghouse Promotes Three Officials

L. E. Osborne, vice president and manager of the steam division of the Westinghouse Electric & Mfg. Company, Philadelphia, Pa., recently announced the appointment of Floyd T. Hague as assistant to the vice president.

Mr. Hague will serve as engineering consultant and will act in the same capacity for all departments of the division.

At the same time C. B. Campbell was named manager of engineering, filling the position left vacant by Mr. Hague, and J. S. Newton was appointed assistant manager of engineering.

Mr. Osborne explained that this realignment in the division engineering organization will facilitate wartime activities in steam turbine engineering and in developments expected to lead to gas turbine production after the war.

Promotion Pieces Offered

The commercial lighting equipment section of the National Electrical Manufacturers Association, 155 East 44th Street, New York 17, New York, is offering to public utilities a series of direct mail promotion pieces.

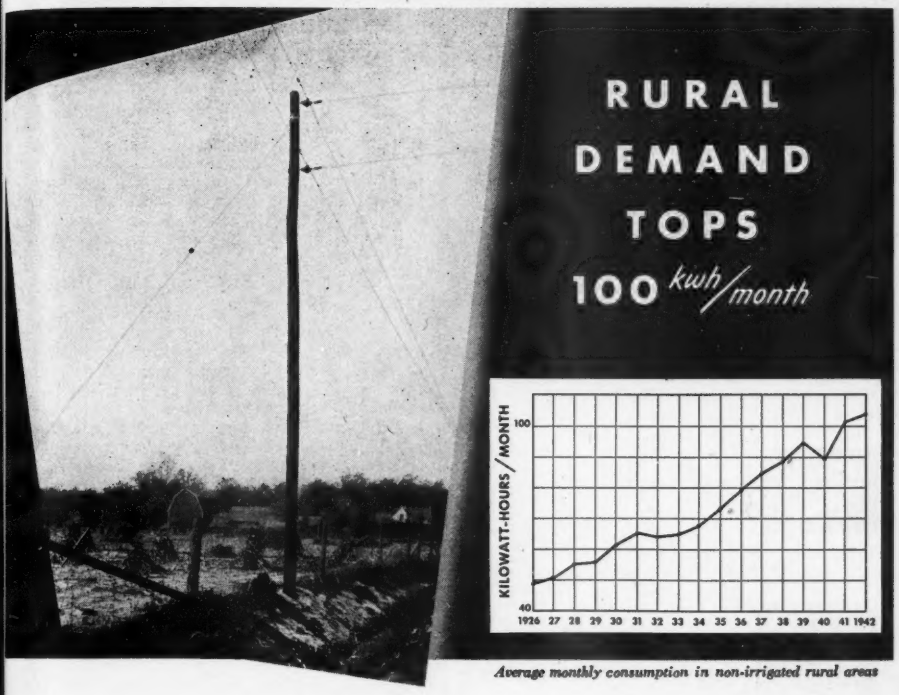
The illustrated folders, entitled "Extra Help for Your Maintenance of Lighting Facilities," "How to Get Increased Manpower from Existing Personnel," and "Ways to Speed Up Production with Better Lighting," are the first of several which are planned by this committee.

Additional information, as well as prices of the pieces, may be obtained from the NEMA.

New A-C Publication

Allis-Chalmers announces the publication of a new quick-picture bulletin which describes each of the various V-belts, sheaves, and drives in its calibrated line of V-belt drive equipment. Five special kinds of Allis-Chalmers Texrope V-belts—each designed for a specific type of protection—are reviewed.

The new type Allis-Chalmers Magic-Grip Sheave and the four speed changing methods used in Allis-Chalmers sheaves are also described in this new bulletin, B-6331, which is available from Allis-Chalmers, Milwaukee 1, Wisconsin.



Average monthly consumption in non-irrigated rural areas

Climbing from less than fifty kilowatt-hours per month in 1926 to well over a hundred today, rural power consumption promises to hasten obsolescence of even the latter figure. For, included in that average are many young rural lines, whose customers have not been able to equip themselves with electrical appliances since the war began. Others are just becoming accustomed to having electrical help at hand.

Purchasers of Aluminum Cable Steel Reinforced will recall that Alcoa engineers have always preferred not to recommend conductors smaller than Number 4 A.C.S.R. Alcoa's supervisors, close to the feel of things in the field, prophesied that farm operators would adopt electrical help eagerly. Low conductivity wires would limit the power they could take from their lines.

Consult with Alcoa engineers on the sizes of A.C.S.R. which will provide current-carrying capacities permitting future load expansion. A.C.S.R. has the high strength and durability required in modern line construction. ALUMINUM COMPANY OF AMERICA, 2134 Gulf Building, Pittsburgh 19, Pennsylvania.

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Evans Products Co. Appoints New Sales Promotion Manager

APPOINTMENT of Harold T. Bodkin as sales promotion manager is announced by A. W. Shields, general sales manager Evanair division, Evans Products Co., Detroit, Mich.

Mr. Bodkin's new duties with Evans Products Co. will center upon national sales promotion for the new Evanair line of space heaters, water heaters, floor furnaces and other heating equipment manufactured by the company.

Awarded Star for "E" Flag

THE employees and management of the Cochrane Corporation, Philadelphia, manufacturers of water conditioning apparatus, steam power plant equipment and flow measuring instruments, have been notified by the Navy Department of the renewal of the "E" Production Award granted last February, signified by the addition of a star to their "E" pennant.

New G-E Division Manager

GENERAL ELECTRIC announces the appointment of G. R. Prout as manager of the air conditioning and refrigeration division of the appliance and merchandise department. He will be located in Bloomfield, N. J., where headquarters of the company's air conditioning and commercial refrigeration activities are located.

PROFESSIONAL DIRECTORY

• This Directory is reserved for engineers, accountants, rate experts, consultants, and others equipped to serve utilities in all matters relating to rate questions, appraisals, valuations, special reports, investigations, design, and construction. ‹ ‹ ‹

(Professional Directory Continued on Next Page)

PROFESSIONAL DIRECTORY *continued*

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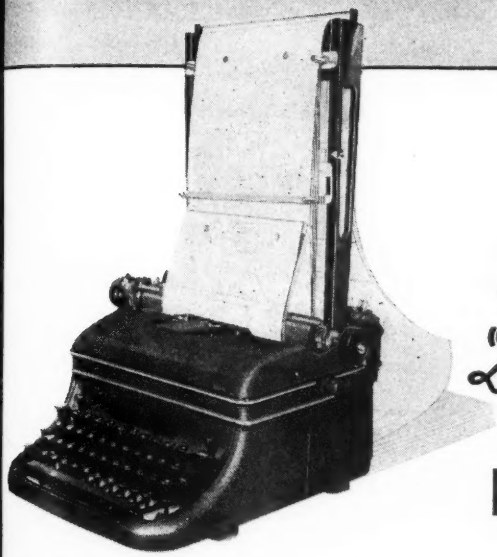

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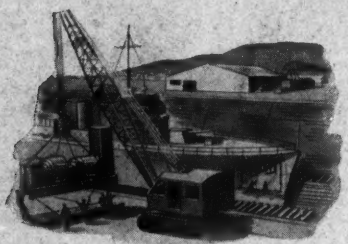
DIELECTRIC STRENGTH of insulating liquids such as oil and Pyranol* can now be tested with greater speed and accuracy, using an improved 30,000-volt portable test set just developed by G.E. Self-contained and fully metal-enclosed, the tester can be used indoors. Test voltage is smoothly variable from 0 to 30,000 volts. When the sample under test breaks down, an automatic circuit breaker opens the circuit and protects the electrodes.



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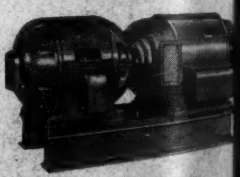

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SERVICE ENGINEERS in the electric utility industry face a range of problems that's broader than ever—advising on maintenance and repair—showing how to conserve power and materials—helping industry meet wartime tasks with the right electrical tools. In all these fields, General Electric has *new* ideas to offer, of which these four are typical examples. Your service work will be more productive as you keep in touch with what G.E. is doing. *General Electric Company, Schenectady, New York.*

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